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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

UNION CARBIDE CORPORATION,
FMC CORPORATION,
MONSANTO COMPANY,
EXXON CORPORATION,
AMERICAN MINING CONGRESS,
AMERICAN IRON & STEEL INSTITUTE,
AND AMERICAN PETROLEUM INSTITUTE,
Petitioners,
v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
ENVIRONMENTAL DEFENSE FUND, INC.,
CITIZENS FOR A BETTER ENVIRONMENT,
AND BUSINESSMEN FOR THE PUBLIC INTEREST, INC.,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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QUESTIONS PRESENTED

1. Whether, contrary to this Court's decisions in *System Federation No. 91* and *Vermont Yankee*, the consent decree entered, modified, and continued in this case contravenes constitutional separation-of-powers principles by requiring an official of the Executive Branch, the Administrator of EPA, to undertake regulatory programs and to apply regulatory criteria not mandated by the Clean Water Act.
2. Whether Congress intended that the Clean Water Act of 1977 supersede the consent decree.
3. Whether the district court has jurisdiction to preserve and enforce the consent decree if the underlying causes of action are moot.

PARTIES TO THE PROCEEDING

Petitioners (appellants in the court of appeals) are Union Carbide Corporation, FMC Corporation, Monsanto Company, Exxon Corporation, American Mining Congress, American Iron and Steel Institute, and American Petroleum Institute.* Other appellants in the court of appeals (and respondents under Rule 19.6 here) were Celanese Company, E. I. du Pont de Nemours and Company, Dow Chemical Company, Allegheny Power System, Inc. (Monongahela Power Company, Potomac Edison Company, West Penn Power Company), American Electric Power Company, Inc. (Appalachian Power Company, Columbus & Southern Ohio Electric Company, Indiana & Michigan Electric Company, Kentucky Power Company, Ohio Power Company), Baltimore Gas and Electric Company, Carolina Power & Light Company, Central and South West Services Inc., Central Hudson Gas and Electric Corporation, Central Illinois Light Company, Central Illinois Public Service Company, Cincinnati Gas & Electric Company, Cleveland Electric Illuminating Company, Commonwealth Edison Company, Consolidated Edison Company of New York, Inc., The Dayton Power & Light Company, Delmarva Power & Light Company, Detroit Edison Company, Duke Power Company, Edison Electric Institute, Florida Power & Light Company, Gulf States Utilities Company, Houston Lighting & Power Company, Illinois Power Company, Indianapolis Power & Light Company, Iowa Public Service Company, Kansas City Power & Light Company, Madison Gas and Electric Company, Middle South Services, Inc. (Arkansas-Missouri Power Company, Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, New Orleans Public Service, Inc.), Minnesota Power and

* In accordance with Rule 28.1 of the Rules of the Supreme Court, the non-wholly owned subsidiaries and affiliates of each petitioner are set forth in the separately-bound appendices to this petition, App. C at 1c.

Light Company, Montaup Electric Company, National Rural Electric Cooperative Association, New England Power Company, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Northeast Utilities Service Company (The Connecticut Light & Power Company, The Hartford Electric Light Company, Holyoke Water Power Company, Western Massachusetts Electric Company), Northern Indiana Public Service Company, Ohio Edison Company, Ohio Valley Electric Corporation, Oklahoma Gas and Electric Company, Pacific Gas and Electric Company, Pennsylvania Power & Light Company, Philadelphia Electric Company, Potomac Electric Power Company, Public Service Company of Indiana, Inc., Public Service Electric and Gas Company, Rochester Gas & Electric Corporation, San Diego Gas & Electric Company, South Carolina Electric & Gas Company, Southern California Edison Company, Southern Company Services, Inc. (Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company), Tampa Electric Company, Texas Utilities Company, Toledo Edison Company, Union Electric Company, Virginia Electric and Power Company, Wisconsin Electric Power Company, Wisconsin Power and Light Company, and Wisconsin Public Service Corporation. Each of the foregoing parties is an intervening defendant in the district court. Other intervening defendants in the district court (but not appellants in the court of appeals) are National Coal Association, American Cyanamid Company, Shell Chemical Company, Standard Oil Company (Indiana), Standard Oil Company (Ohio), Union Oil Company, Olin Corporation, The General Tire & Rubber Company, Firestone Tire & Rubber Company, Goodyear Tire & Rubber Company, B.F. Goodrich Company, American Paper Institute, and National Forest Products Association.

Respondents (appellees in the court of appeals) are Natural Resources Defense Council, Inc., Environmental Defense Fund, Inc., Citizens For A Better Environment, and Businessmen For The Public Interest, Inc. A respondent under Rule 19.6 (also an appellee in the court of appeals) is William D. Ruckelshaus, Administrator, Environmental Protection Agency. Party plaintiffs in the district court also include National Audubon Society, Inc. and Dennis L. Adameczyk.

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Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Union Carbide Corporation, et al., respectfully petition for a writ of certiorari to review the decisions of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals dated October 4, 1983 is reported at 718 F.2d 1117 and is reprinted in the separately-bound appendices to this petition, App. A at 1a. The corresponding opinions of the district court were

dated February 5, 1982 and May 7, 1982. They were unofficially reported at 16 Env't Rep. Cas. (BNA) 2084 and 17 Env't Rep. Cas. (BNA) 2013, respectively, and are reprinted in the separately-bound appendices, App. A at 103a, 117a. The opinion of the court of appeals dated September 16, 1980 is reported at 636 F.2d 1229, and is reprinted in the appendices, App. A at 45a. The corresponding opinion of the district court was dated March 9, 1979, and was unofficially reported at 12 Env't Rep. Cas. (BNA) 1833. It is reprinted in the appendices, App. A at 121a.

JURISDICTION

In its opinion dated September 16, 1980, the court of appeals dealt with several legal issues presented to it but remanded the case to the district court to consider another issue. (App. A at 100a.) Accordingly, at that point review by this Court on a petition for writ of certiorari was not appropriate. See *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967).

The further opinion and judgment of the court of appeals was entered on October 4, 1983. (App. A at 1a (opinion) and 195a (judgment).) A timely petition for rehearing and a suggestion for rehearing *en banc* were denied by orders of the court entered on November 18, 1983. (App. A at 203a, 205a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 1, article II, §§ 1 (first sentence) and 3, and article III, §§ 1 and 2 (first clause) of the Constitution, along with Sections 301(b), 302, 303, 306 and 307 of the Clean Water Act, 33 U.S.C. §§ 1311(b), 1312, 1313, 1316 and 1317, are reprinted in the separately-bound appendices to this petition, App. B at 1b.

STATEMENT

This case concerns a consent decree which requires the Administrator of the Environmental Protection Agency ("EPA") to undertake regulatory programs and to apply regulatory criteria not mandated by statute. The court of appeals in two opinions, one in 1980 and the other in 1983, considered the question whether the consent decree impermissibly constrains the discretion Congress granted to the Administrator in the Clean Water Act. In its 1983 decision, a divided panel of the court of appeals finally concluded that the constraints on the Administrator's discretion imposed by the decree were not impermissible. Rehearing *en banc* was denied by a divided five-to-three vote (three judges not participating).

The extended consideration accorded the constrained-discretion issue in the court of appeals reflects that court's discomfiture with and uncertainty over application of this Court's decisions recognizing limitations on judicial power derived from constitutional separation-of-powers principles. The ultimate decision of the closely divided court of appeals fails to apply those principles properly. Specifically, the 1983 decision conflicts with the premises of this Court's decisions in *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), and *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

A. Statutory Framework

Under the Clean Water Act ("the Act"), EPA is directed to issue four basic types of effluent regulations. While the complaints in this litigation specifically concerned two of these types of regulations, both of which arise under Section 307 of the Act, 33 U.S.C. § 1317, the consent decree resulting from them relates to all four types of regulations, and specifies additional non-statutory programs as well.

The four different types of effluent regulations may be characterized as follows: Section 301(b) of the Act, 33 U.S.C. § 1311(b), calls on EPA to establish technology-based effluent limitations regulations for the various major segments of American industry. See *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977) ("du Pont"). Section 306 of the Act, 33 U.S.C. § 1316, provides that EPA is to issue national standards of performance for new sources in these major categories of industry. See *du Pont*, *supra*, 430 U.S. at 137. Under Section 307(a), 33 U.S.C. § 1317(a), EPA is to issue national effluent standards for toxic pollutants.¹ Finally, Sections 307(b) and (c), 33 U.S.C. § 1317(b) and (c), authorize EPA to issue pretreatment standards for existing and new sources of discharges, respectively, into publicly owned treatment works.

B. The Complaints

Four separate complaints are involved in this litigation. The first suit was brought in 1973 by the Natural Resources Defense Council, Inc. and several other groups ("NRDC") against EPA. NRDC alleged that the Agency had violated Section 307(a) of the Act by developing a list of toxic pollutants using selection criteria that were not specified in the then-extant provisions of Section 307(a) and which improperly limited the list.² NRDC also alleged that EPA had unlawfully failed to list 25 substances. After EPA had filed the "administrative record" regarding its actions, the district court granted EPA's motion to dismiss the complaint. The court held that the Administrator had not abused his discretion when he established the list and that the Administrator's consideration of other substances for inclusion on the

¹ In doing so, EPA may designate the categories of sources to which each such effluent standard applies. See Section 307(a)(5), 33 U.S.C. § 1317(a)(5).

² *NRDC v. Train*, No. 2153-73 (D.D.C., filed Dec. 7, 1973).

list satisfied the statutory command that the list be revised from time to time. On appeal the court of appeals reversed, holding that plaintiffs' counsel had made a substantial showing that the Administrator had not produced the entire administrative record of his decision. *NRDC v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975).

The second and third complaints concerned a different aspect of Section 307(a). NRDC and others alleged that EPA had violated then-existing Section 307(a) of the Act by failing to promulgate final toxic pollutant effluent standards for the nine listed substances within six months of proposal of such standards.³ The complaints requested the court to order EPA to establish final standards for the nine substances.

The fourth case addressed pretreatment standards under Section 307(b) of the Act. NRDC claimed that EPA violated Section 307(b)(1) by failing to establish final pretreatment regulations within 90 days of the date EPA published proposed regulations.⁴

C. The Consent Decree

After the three 1975 complaints had been brought, and the dismissal of the 1973 complaint had been reversed by the court of appeals on a procedural ground, NRDC and EPA began settlement negotiations. These discussions coincided with a policy decision within the Agency to abandon any major effort to set toxic pollutant effluent standards based upon Section 307(a) and instead to rely more heavily on technology-based effluent limitations and standards based upon Sections 301(b) and 306 of the Act. NRDC and EPA embodied these policy choices in a joint settlement agreement intended as a resolution of the

³ *Environmental Defense Fund v. Train*, No. 75-0172 (D.D.C., filed Feb. 6, 1975); *Citizens For A Better Environment v. Train*, No. 75-1698 (D.D.C., filed Oct. 15, 1975).

⁴ *NRDC v. Train*, No. 75-1267 (D.D.C., filed Aug. 4, 1975).

four pending lawsuits.⁵ As NRDC has observed, "[t]he Agreement sets out the precise nature, scope, and timing of every aspect of EPA's program." Brief for Appellees NRDC, et al., at 4, in *Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229 (D.C. Cir. 1980). Portions of the agreement do relate to, and require that EPA carry out, statutory mandates.⁶ Other portions, however, have no direct statutory basis, i.e., they compel EPA to employ criteria and standards not found in the Act and to implement whole regulatory programs not present in the Act.⁷

NRDC and EPA jointly proffered the settlement agreement to the district court on March 31, 1976. The district court allowed interested persons to file comments regarding it, whether the persons were parties or not, and a number of industry groups vigorously opposed both the settlement and entry of the settlement as a decree of the court. After requiring several modifications to the agreement,⁸ on June 9, 1976 the court ap-

⁵ Several industrial groups including the American Iron and Steel Institute and American Petroleum Institute had intervened in one of the cases, No. 75-0172, shortly after suit was brought. These intervenors were given notice of the settlement agreement after it had been negotiated but before it was presented to the district court.

⁶ These portions of the agreement largely concern deadlines for issuing effluent limitation regulations. See ¶ 7 of the agreement, App. A at 164a-166a (initial agreement), 142a-143a (March 1979 order), 118a-120a (May 1982 order). See also *infra*, at 13 n.11 (discussing August 1983 and January 1984 modifications to the schedule).

⁷ Examples of these provisions are ¶¶ 4(c), 8 and 12 of the agreement as modified. App. A at 141a-146a. See *infra*, at 19 n.13.

⁸ Among other things, the district court advised that it would "not review substantive judgments made by the Administrator of EPA as the original agreement seemed to require, but will merely ensure good faith compliance with the terms of the agreement." *NRDC v. Train*, 8 Env't Rep. Cas. (BNA) 2120, 2121 (D.D.C. 1976), App. A 151a (footnote omitted).

The district court acknowledged the possibility "that even this limited role will require a substantial investment of judicial resources." *Id.* at 2121, App. A 152a.

proved it as a "just, fair, and equitable resolution of the issues raised." *NRDC v. Train*, 8 Env't Rep. Cas. (BNA) 2120, 2122 (D.D.C. 1976), App. A 156a. The agreement was entered as a decree of the court. No appeal was taken from the order adopting the agreement.⁹

D. The Clean Water Act of 1977

In 1976 and 1977, Congress considered amendments to the Federal Water Pollution Control Act ("FWPCA"). During Congress' deliberations both EPA and NRDC put forward the policy positions that had been embodied in their settlement agreement (and thus in the district court's decree). In December 1977, Congress passed extensive amendments to the Federal Water Pollution Control Act (the "1977 Amendments")¹⁰ which in effect adopted several key aspects of the decree:

The highlight of this bill—the most important and far-reaching amendments are contained in a package of provisions responding to the most critical deficiencies in . . . [the 1972 FWPCA] dealing with toxic pollutants and the 1983 requirements in the act for industrial discharges.

⁹ An appeal was taken from an order of the district court denying the applications of several groups of manufacturers to intervene in the litigation. The court of appeals reversed the district court's denial of intervention, holding that the groups were entitled to intervene as of right under Fed. R. Civ. P. 24(a)(2). *NRDC v. Costle*, 561 F.2d 904 (D.C. Cir. 1977).

In opposing intervention, EPA among other things had argued that "intervention has . . . been denied . . . when private parties have sought to interfere with a consent decree worked out by a federal agency." Federal Defendants' Opposition to Motion for Leave to Intervene, served April 5, 1976, at 19. EPA also claimed that it shared the asserted interests in the regulatory process of the industry applicants for intervention. *Id.* at 15. In ordering that intervention be granted, the court of appeals rejected EPA's claims. *NRDC v. Costle*, *supra*, 561 F.2d at 908-912.

¹⁰ The Act was also redesignated as the "Clean Water Act." Section 518 of the Act, 33 U.S.C. § 1251 note.

123 Cong. Rec. 38,959 (1977) (Statement of Congressman Roberts, manager on the part of the House of the Committee on Conference).

The toxic pollutant provisions of the 1977 Amendments repealed then-existing requirements of Section 307 of the Act that required EPA to proceed under a strict time schedule to establish health-based effluent standards on a pollutant-by-pollutant basis. Instead, the new Section 307, when taken with new Section 301(b), requires that EPA issue technology-based effluent limitation regulations for sixty-five specified pollutants on an industry-by-industry basis.

Immediately prior to House adoption of the Conference Report, the floor manager, Congressman Roberts, explained that the amendments gave EPA both the authority and the discretion necessary for an effective regulatory program and that the consent decree accordingly should be vacated:

In summary, the revisions to the toxics regulatory program contained in the conference report on H.R. 3199 simplify the procedures for identifying toxic pollutants and promulgating regulations according to their characteristics. The discretion exercised by the Administrator is broadened, the procedures less formally structured, and burdens of proof modified to the point where the program may proceed in a more rapid and orderly fashion without further recourse to the courts.

Crisis-by-crisis reaction to the problem of toxics must no longer be the norm, but [be] replaced by an orderly program for adding compounds to the list, with the Administrator fully in charge. *It, therefore, would be entirely appropriate for the United States to petition the courts to relinquish jurisdiction over toxic pollutant control under Public Law 92-500 [the 1972 FWPCA], now that the statutory basis has been laid for a workable regulatory pro-*

gram the lack whereof led to the litigation resulting in the consent decree. This is particularly appropriate in view of the large number of potentially toxic chemicals to be addressed by the program and the need for administrative discretion within the revised regulatory framework to carry out the provisions of law enacted herein.

This is the intent of this legislation, an outgrowth of House initiatives by the House conferees.

123 Cong. Rec. 38,960-61 (1977) (emphasis added).

Congressman Roberts was a member of the committee that drafted the 1972 FWPCA, the Chairman of the subcommittee of the House Committee on Public Works and Transportation that drafted the 1977 Amendments, the Chairman of the House conferees, the Vice Chairman of the House-Senate Conference Committee, and the House floor manager of the Conference Report. The statement in question was made by him—prior to the House vote on the 1977 Amendments—in his capacity as the floor manager of the Conference Report on the 1977 Amendments, in order to apprise his colleagues as to the intent of the conferees.

His statement takes on added significance in light of the fact that the toxic pollutant provisions of the 1977 Amendments were drafted in the Conference Committee. See 123 Cong. Rec. at 38,949 *et seq.*, providing a comparison of the House Bill and the Senate Bill with the resulting 1977 Amendments. Thus, the Committee Reports which accompanied the original bills are of no value in interpreting the toxic pollutant provisions of the 1977 Amendments. The only relevant legislative history with respect to these provisions is the Conference Report (H.R. Rep. No. 830, 95th Cong., 1st Sess. 82-85 (1977), reprinted in 1977 U.S. Code Cong. & Ad. News at 4457-60) and the statements of the members who managed the Conference Report on the floor of the House and Senate.

E. Subsequent Proceedings In District Court Regarding The Decree

After enactment of the 1977 Amendments, EPA did not move to have the decree vacated. Rather the Agency proceeded with its efforts to carry out the new statutory requirements. However, on September 26, 1978, NRDC moved for an order to show cause why EPA should not be held in contempt of court for failing to meet various deadlines set by the consent decree. EPA responded with a motion to amend the decree by (1) extending the deadlines for establishing regulations, (2) modifying the Agency's authority to exclude certain pollutants and industry categories from regulation, and (3) extending the deadline for compliance with the regulations to June 30, 1984. *See Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 1237 (D.C. Cir. 1980), App. A 54a.

Contemporaneously, the industry parties who by then had been granted intervention ("the Companies") filed a motion to vacate the decree. They advanced three independent grounds for relief: (1) Congress intended that the toxic pollutant provisions of the 1977 Amendments supersede the provisions of the decree, (2) the decree should be vacated because the four cases that underlay it were moot, and (3) modification of the decree would abridge applicable public notice-and-comment requirements. (*See id.* at 1237, App. A 54a-55a.)

NRDC then filed discovery requests concerning virtually every phase of EPA's program to implement the Act, including the basis for levels of funding and staffing at the Agency. After the parties agreed to a schedule for discovery, briefing, and a hearing, NRDC and EPA began negotiating a settlement of the further controversy. The Companies were excluded from these discussions. On November 28, 1978, EPA held a meeting with the Companies and announced that it had reached a tentative agreement with NRDC. The Companies were given ten days to submit written comments regarding

the tentative agreement. The comments submitted did not result in any substantive revision of the tentative agreement although certain technical changes based on these comments were incorporated. *NRDC v. Costle*, 12 Env't Rep. Cas. (BNA) 1833, 1834, App. A 123a.

To carry out their new settlement, EPA and NRDC filed a joint motion to modify the decree and withdrew their earlier motions. NRDC also withdrew the interrogatories it had served on EPA. The Companies declined to withdraw their motion to vacate. The district court on March 9, 1979 denied the Companies' motion to vacate and granted the joint EPA-NRDC motion to modify the decree. (*Id.* at 1840, App. A 139a.) In denying the Companies' motion, the court held that (1) Congress did not intend the 1977 Amendments to supersede the consent decree, (2) even assuming that some of the four cases underlying the decree were moot, the mootness challenge must fail because the original causes of action have become inseparable and the decree representing the four cases must be taken as a whole, and (3) the modification would not violate notice-and-comment requirements. (*Id.* at 1836, 1838, App. A 128a, 132a-136a.)

F. The Decisions Of The Court Of Appeals

1. *The court of appeals' "affirmed and remanded" decision of September 1980.*

On the Companies' appeal, the court of appeals affirmed the district court's order refusing to vacate the decree, but it remanded to the district court for consideration of the question whether the consent decree impermissibly infringes on the discretion Congress committed to EPA to implement the Clean Water Act. *Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 1259 (D.C. Cir. 1980), App. A 100a. The court of appeals noted that "[t]he Companies' brief adverted to this issue in connection with their argument that the modifications constituted rulemaking, but did not pre-

sent it as an independent objection to the modified settlement agreement." (*Id.* at 1258 n.99, App. A 98a n.99.) In remanding, the court commented that "EPA, for example, seems to attach no particular significance to the fact that the Agreement is embodied in a court order", and also that "[i]t is not clear whether EPA . . . considers itself bound to follow the procedures and decisionmaking criteria set out in the Agreement only for as long as the Administrator deems them appropriate." (*Id.* at 1258, App. A 99a.)

2. *The district court's proceedings on remand.*

On remand, the Companies filed with the district court a Motion to Vacate the Consent Decree Or, Alternatively, to Revise the Decree. EPA filed a cross-motion requesting that the district court modify the decree in light of enumerated "changed circumstances." EPA's requested modifications were comparable to the revisions sought alternatively by the Companies. NRDC opposed both motions.

By orders dated February 5, 1982 and May 7, 1982, the district court denied both the Companies' and EPA's motions to modify the decree. *NRDC v. Gorsuch*, 16 Env't Rep. Cas. (BNA) 2084 (D.D.C. 1982), App. A 103a, and 17 Env't Rep. Cas. (BNA) 2013 (D.D.C. 1982), App. A 117a. In denying the Companies' motion, the district court said it had "no doubt that the instant settlement agreement infringes to some degree on the EPA Administrator's discretion." (16 Env't Rep. Cas. (BNA) at 2087, App. A 107a.) Nevertheless, it did "not believe that this infringement is impermissible." *Id.*

The district court claimed "particularly broad" equitable powers to "utilize flexible and novel approaches to implement congressional intent," especially "where the public interest is involved," and described the entry and continuation of the decree as an exercise of those equitable powers. (*Id.* at 2087-88, App. A 108a-109a.) The

district court pointed out that a remedial order must be based upon the "presence of unlawful or impermissible agency action." (*Id.* at 2088, App. A 109a.) However, the court made no attempt to find a *nexus* between any unlawful agency action and the provisions of the decree. The court did not analyze the provisions of the decree in light of the Administrator's statutory obligations and possible failure to perform those obligations. Instead, the court broadly asserted that "the agency has failed to implement a congressionally sanctioned process aimed at protecting the public from toxic pollutants" and that "the aggregate record of the EPA with regard to the regulation of these toxic pollutants can be considered equivalent to administrative action unlawfully withheld." (*Id.* at 2088, App. A 109a.)

Regarding EPA's motion, the district court said it was denying any relief because "at the present time the defendants have presented insufficient justification for revising the consent decree" (17 Env't Rep. Cas. (BNA) 2015, App. A 117a), and that "at this point in time the EPA must be pushed to work harder." *Id.*¹¹

¹¹ The court also directed EPA to complete within one year its regulatory actions to establish technology-based regulations for various industries. See 17 Env't Rep. Cas. (BNA) 2015-16, App. A 119a-120a. Subsequently, on October 26, 1982, the court granted a different motion by EPA to modify the decree, aimed only at revising the schedule for establishing effluent regulations for certain industries. Thereafter, on August 2, 1983 and January 6, 1984, the court granted further motions by EPA to modify the schedule in the decree for establishing regulations for specific industries.

NRDC's requests for awards of attorneys' fees have also been disputed in the litigation. On August 16, 1978, the district court awarded NRDC attorneys' fees and costs of litigation totalling \$100,976.14, covering the period of September 1973 through November 1977. During this period, NRDC initiated the lawsuits and negotiated the original settlement with EPA. The award of attorneys' fees and costs was against the government, which took no appeal.

On May 17, 1982, NRDC moved the court for an order awarding further costs of litigation, including attorneys' fees, covering the

3. *The court of appeals' decision of October 1983.*

On appeal from the district court's orders on remand refusing both the Companies' and EPA's motions to vacate or modify the decree, the court of appeals by divided vote affirmed. *Citizens For A Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983), App. A 1a. In an opinion by Senior District Judge Bonsal, sitting by designation, joined by Judge Wald, the court held that the decree did not impermissibly infringe upon the Administrator's congressionally-conferred discretion. (718 F.2d 1120, App. A 8a.) The majority acknowledged, as all parties had, that the decree constrains the discretion of EPA's Administrator by requiring him to apply criteria and standards not found in the Act and to undertake programs not required by the Act. (718 F.2d 1124, App. A 17a.) The majority concluded that these constraints were permissible, stressing that the decree provided a means of implementing the Act "that is acceptable to both sides [sic] in this dispute" and emphasizing that the decree was "consistent with the purpose of the [Act]." (718 F.2d 1126, App. A 22a.) The ma-

period of May 1978 onwards. This time, NRDC sought an award against both EPA and the Companies. It did not, however, then specify the amount requested. Eleven months later, on April 20, 1983, NRDC filed a detailed memorandum in support of this motion requesting attorneys' fees in the amount of \$196,799.93. This request was based upon an extraordinarily enhanced award of 210 percent of the "lodestar" value for the time its attorneys spent regarding implementation of the decree (717.79 hours), and an enhanced award of 115 percent of the lodestar rate for 188.45 hours spent in preparing the attorneys' fees motion itself. NRDC has subsequently requested an additional award of \$15,525.50 for preparation of a reply to the oppositions of EPA and the Companies. The district court has not yet ruled on NRDC's motion.

NRDC's motion for further attorneys' fees specifically excluded any request for an award of attorneys' fees concerning the judicial proceedings related to the constrained-discretion issue. NRDC implied that its work regarding that issue would be covered by a subsequent request.

jority considered that the Companies had advocated "an overly literal reading of *System Federation No. 91 v. Wright*, [364 U.S. 642 (1961)]." (718 F.2d 1125, App. A 19a.) In the majority's view, this Court's reference in that case to statutory authority for a consent decree could be construed instead to relate merely to consideration of general statutory purposes:

The statement [in *System Federation No. 91*] that a district court's 'authority to adopt a consent decree comes only from the statute which the decree is intended to enforce,' . . . means only that the focus of the court's attention in assessing the agreement should be the purposes which the statute is intended to serve, rather than the interests of each party to the settlement.

(*Id.*)

The majority correlatively distinguished this Court's decision in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), on the ground that the decree in the instant case was initially entered "*with EPA's consent*" (emphasis by the court). In doing so, the majority adopted a general "public interest" test for entry of consent decrees:

It may well be, as the Companies argue, that "*a court has a duty to determine that any consent judgment rendered is within the bounds of its judicial power, notwithstanding the parties' consent.*" Br. for Appellants at 40. Nevertheless, as the discussion in Part II above [regarding *System Federation No. 91*] indicates, a court fulfills its responsibility in this respect simply by determining that the settlement is consistent with the statute the consent judgment is to enforce and fairly and reasonably resolves the controversy in a manner consistent with the public interest.

(718 F.2d 1128, App. A 24a-25a (emphasis added).)

Judge Wilkey in dissent disagreed with the fundamental premises of the majority's decision. He began his analysis with the undisputed fact that "the decree does restrict the discretion of the Administrator of the EPA." (718 F.2d 1131, App. A 33a.) In his view the constraints were "not *de minimis*"; indeed, "[t]hey impose[d] duties on the Administrator that differ in kind as well as in scope from those duties imposed by the Act." (718 F.2d 1131-32, App. A 33a.) They were neither mandated by the Act nor necessary to ensure that EPA performs its duties under the statute. *Id.*¹³

Judge Wilkey looked to the constitutional limits on the power of an article III court, and concluded from this Court's decisions construing those limits that a federal court may not issue any order or decree commanding an Executive Branch official to exercise his or her regulatory discretion in a particular way. (718 F.2d 1131, App 32a.) He considered that the consent decree constituted judicial action "without any statutory or constitutional mandate." (718 F.2d 1135, App. A 40a.) In his view, permitting a federal court's equity power to extend so far "would abolish the principle of separation of powers" (*id.*), and would weaken democratic control over action by administrative agencies. (718 F.2d 1136, App. A 42a-43a.)

Judge Wilkey distinguished the very broad equity powers assumed by federal courts in apportionment cases and in instances of violation of the equal protection and due process clauses of the Constitution on the ground that those cases involved the supremacy clause and this

¹³ Judge Wilkey also addressed the majority's emphasis that the decree was initially entered with the consent of an Administrator. In his view, "[f]or reasons that ultimately have to do with preserving the democratic nature of our Republic, American courts have never allowed an agency chief to bind his successor in the exercise of his discretion." (718 F.2d 1134, App. A 38a-39a.)

case concerned intra-federal separation-of-powers limitations:

Courts have used their equitable powers to assume administrative and legislative roles, supervising in a highly active and intrusive manner prisons, school systems, mental hospitals and electoral apportionment.

In those cases, however, the court invariably acts against state governments or individual citizens. Those decisions in which the court seizes the broadest powers are also those in which it declares that the doctrine of separation of powers does not apply "vertically" when courts act under the Supremacy Clause. In the case at issue, the court acts against a coordinate and co-equal branch of government. The court cannot take refuge in the Supremacy Clause. The court must face head-on the separation of powers issue.

(718 F.2d 1134-35, App. A 39a-40a (footnotes omitted).)

4. Denial of rehearing en banc.

A timely petition for rehearing and a suggestion for rehearing *en banc* were denied by orders of the court of appeals entered November 18, 1983. (App. A 203a, 205a.) Chief Judge Robinson and Judges Wald, Mikva, Edwards, and Ginsburg voted to deny rehearing *en banc*. Judges Wilkey, Scalia, and Starr noted that they "would [have] grant[ed] rehearing *en banc* for the reasons set forth in Judge Wilkey's dissenting opinion" (App. A 206a), and Judges Wright, Tamm, and Bork did not participate.

REASONS FOR GRANTING THE WRIT

The first issue presented in this petition is one of considerable importance. The question whether a regulatory officer's statutorily-conferred discretion can be diminished by constraints in a consent decree has significant

implications for the continued working relationships of the Executive, Legislative, and Judicial Branches of the Federal government. Resolution of the issue turns on the proper limits of the power of the federal courts under article III of the Constitution. As Judge Wilkey observed, a "government by consent decree" has fundamental, negative effects upon the processes and institutions of representative democracy: it enhances the powers of special interest groups and diminishes the responsiveness of Federal agencies to the views of other citizens, Congress, and even the Executive. In its decisions in *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), and *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), this Court drew upon the limitations of article III of the Constitution and the coordinate role of the judiciary in a democracy to evaluate the validity of judicial actions that abridged statutory commands and executive authority. The decision by the majority of the court of appeals in this case conflicts with principles recognized and applied in those decisions.

I. CONTRARY TO THIS COURT'S DECISIONS IN *SYSTEM FEDERATION NO. 91* AND *VERMONT YANKEE*, THE DECREE APPROVED BY THE COURT OF APPEALS CONTRAVENES CONSTITUTIONAL SEPARATION-OF-POWERS PRINCIPLES BY CONSTRAINING THE STATUTORILY-CONFERRED DISCRETION OF AN OFFICIAL OF THE EXECUTIVE BRANCH

A. The Decree Exceeds The Judicial Power Conferred On A Federal Court By Article III Of The Constitution

Everyone involved with this litigation has acknowledged that substantial portions of the consent decree constrain the statutorily-conferred regulatory discretion of an Administrator of EPA either by requiring the Agency to apply criteria and standards not found in the Clean Water Act or by mandating the Agency to under-

take programs not required by the statute.¹³ These provisions of the decree spring solely from the settlement "contract" and have no basis in any duty imposed upon EPA by the Act.¹⁴

The entry, subsequent modification, and continuation of the consent decree in this case were judicial acts. *Pope v. United States*, 323 U.S. 1, 12 (1944); *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932).¹⁵ A federal court's power to take such action is thus circumscribed by the limits of the judicial power conferred by article III of the Constitution. *System Federation No. 91 v. Wright*, 364 U.S. 642, 652-53 (1961).

Article III provides that the federal judicial power shall only extend to "cases and controversies."¹⁶ This "case and controversy" limitation precludes a court from embodying in a judicial decree a settlement agreement that goes beyond the actual legal dispute between the parties. See *Pope v. United States*, 323 U.S. 1, 11-12 (1944).

¹³ The majority opinion in the court of appeals and Judge Wilkey's dissent both explore in some detail the extra-statutory criteria, standards, and programs required by §§ 4(c), 8, and 12 of the decree. (718 F.2d 1122-24 (majority), 1132-33 (dissent), App. A 13a-17a, 33a-35a.) In a nutshell, §§ 4(c) and 8 of the decree obligate the Administrator to apply criteria and standards not found in the Act in making regulatory decisions. Paragraphs 4(c) and 12 of the decree require the Administrator to undertake regulatory programs that are not required by the Act.

¹⁴ As Judge Wilkey noted, the duties imposed on the Administrator by these provisions of the decree differ in kind as well as in scope from the duties imposed by the Act. (718 F.2d 1131-32, App. A 33a.)

¹⁵ E.g., consent decrees generally are treated as final judgments on the merits and accorded *res judicata* effect. *United States v. Southern Ute Indians*, 402 U.S. 159 (1971); *United States v. International Building Co.*, 345 U.S. 502 (1953).

¹⁶ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951).

In addition, a court's power to adopt a consent decree derives from, and is limited by, the terms of the statute that the decree seeks to enforce. *System Federation No. 91, supra*, 364 U.S. at 652-53. The court may not enlarge upon the statute's substantive requirements. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980). Nor may it prescribe extra-statutory rules of procedure to an administrative agency. *Vermont Yankee Nuclear Power Corp. v. NRDC, supra*, 435 U.S. at 541-49. Indeed, when a court enforces a consent decree it enforces the underlying statute, not a promise between the parties. *System Federation No. 91 supra*, 364 U.S. at 653.¹⁷

The decision by the majority in the court of appeals cannot be reconciled with these fundamental limitations on the scope of federal judicial power under article III.¹⁸

¹⁷ The majority in the court of appeals had no basis for abjuring any reference to statutory provisions as an "overly literal reading of *System Federation No. 91 v. Wright*," and instead relying generally on "the purposes which the statute is intended to serve." (718 F.2d 1125, App. A 19a.)

¹⁸ The decision by the court of appeals in this case also conflicts with decisions by other courts of appeals applying these limitations on judicial power. For example, in *Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983), a district court on motion had vacated those portions of a consent decree that required state funding of a legal services program for prisoners. In affirming, the court of appeals opined—

The district court could not have entered an involuntary decree requiring state officials to do more than the minimum needed to conform with federal law. "[A]n equitable decree should not go further than necessary to eliminate the particular constitutional violation which prompted judicial intervention in the first instance." Similarly, the district court's authority to adopt a consent decree comes only from the law the decree is intended to enforce.

....

[Continued]

1. *The decree contravenes constitutional separation-of-powers principles.*

Because this case involves coordinate branches of the Federal government, the question concerning article III powers turns on separation-of-powers principles rather than on the Supremacy Clause. See 718 F.2d 1134-35, App. A 39a-40a (Wilkey, J., dissenting).¹⁹

From the earliest days of the American Republic, federal courts have acknowledged that they could not dictate how an officer of the Executive Branch would exercise his or her discretion. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion"). This limit on judicial power is based upon a recognition of the separation of powers of co-equal branches of government. *Keller v. Potomac Electric Power Co.*, 261 U.S. 428 (1923). It has been applied by this Court in many dif-

¹⁸ [Continued]

The funding provision, purporting to bind the state, is without authority and in excess of what was required to alleviate violations of federal law.

Id. at 574-75 (citations omitted).

Moreover, the source of the limitation on judicial power in *Washington v. Penwell*, *supra*, was the supremacy clause, not separation-of-powers principles. This Court has accorded less scope to limitations based on the supremacy clause than to those based on separation-of-powers principles. See 718 F.2d 1134-35, App. A 39a-40a (Wilkey, J., dissenting). See also *infra*, n.19 and accompanying text.

¹⁹ Accordingly, the principal question posed by this petition is similar to, but not the same as, that presented in *Maryland v. United States*, 51 U.S.L.W. 3632 (U.S. Feb. 28, 1983) (Rehnquist, J., joined by Burger, C. J., and White, J., dissenting from summary affirmation). For the same reason, it is distinguishable from the question of judicial power typically posed by reapportionment cases and instances of violation of the equal protection and due process clauses of the Constitution. See *supra*, at 16-17. See generally Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 Stan. L. Rev. 661 (1978).

ferent contexts. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980); *Vermont Yankee Nuclear Power Corp. v. NRDC*, *supra*; *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331-34 (1976); *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

The court of appeals' decisions upholding the decree in this case cannot be reconciled with the principles that underlie these decisions. The majority in the court of appeals misapprehended these principles when it focused its evaluation. It asserted approvingly that the consent decree does not compel a particular course of action because it does not dictate the Agency's "final decision on the merits" and does not "prescribe the content of the regulations" that EPA is to issue. (718 F.2d 1128-29, App. A 26a.) However, the decree does "dictate[] to the agency the methods, procedures, and time dimension of the needed inquiry,"²⁰ without any statutory authority for doing so. Consequently, contrary to the conclusion of the majority of the court of appeals, the decree "propel[s] the court into the domain which Congress has set aside exclusively for the administrative agency." *SEC v. Chenery Corp.*, *supra*, 332 U.S. at 196.

2. By initially consenting to the decree, EPA could not waive a constitutionally-based limitation on federal judicial power.

The majority in the court of appeals erred in its assessment that the limitations on judicial power explicated in *Vermont Yankee* and prior decisions of this Court were not applicable because EPA had initially consented to entry of the decree. (718 F.2d 1128, App.

²⁰ *Vermont Yankee Nuclear Power Corp. v. NRDC*, *supra*, 435 U.S. at 545, quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

A 25a-26a.) By initially consenting to the decree, EPA could not waive or elide a constitutionally-based limitation on federal judicial power. See *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 (1982); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951); *Cutler v. Rae*, 48 U.S. (7 How.) 729, 731 (1849).²¹

This case does not concern the government's ability to settle litigation generally; nor does it raise any broadly inclusive issue respecting whether settlement agreements should be entered as judicial decrees. A court can enter as a decree and enforce any settlement agreement the terms of which it could have included in a direct judicial order at the end of the litigation given the statutory violations alleged. It cannot issue a decree which incorporates settlement terms that overreach the provisions of the governing statute.²²

²¹ In *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 237-38 n.10 (1975), this Court commented that "consent decrees . . . have attributes both of contracts and of judicial decrees," and that "consent decrees are treated as contracts for some purposes but not for others." The "contractual" aspects of the decree in this case, however, could not properly have included waiver of a constitutionally-based limitation on judicial power.

²² After trial of the merits, the district court neither would nor could have entered a decree of the type it embraced as a result of the settlement.

The settlement embodied in the decree in this case differs strikingly from the typical settlement reached by EPA or any other federal regulatory agency. Such settlements, whether of enforcement or of rulemaking actions, traditionally have not bound the agency to divest itself of discretion beyond the specific matters in dispute. Even then, the agency always is careful to retain its statutory powers. One commentator described the typical settlement in litigation over rulemaking as follows:

It is a relatively common occurrence . . . for parties that have challenged a regulation to negotiate an acceptable agreement. In return for withdrawing the petition challenging the rule, the agency frequently agrees to publish a change in the regulation

In addition, the court of appeals chose to ignore the fundamental distinction between an agency taking an action because it has determined in the exercise of its administrative discretion that it should do so and an agency being ordered by a court to take that same action. In the former case, the agency is always free to change its mind. See *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 216-17 (1930). But where, as here, a court incorporates in a judicial decree provisions of a settlement agreement that are not required by statute, the present Administrator, and future Administrators, cannot further exercise their discretion by deciding subsequently to change their course of action. But for the order of the district court, EPA now would have courses of action open to it other than those mandated by the decree.²³

as a proposed rule. Because the main parties in interest negotiated the change, few comments are received, and the agency then modifies the rules in accordance with the negotiated agreement. Of course, if an agency receives comments necessitating a change from the negotiated agreement, it must change the rule accordingly.

Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L. J. 1, 37-38 (1982) (footnotes omitted).

Typically, the private and governmental parties to such a settlement agree that if the Agency's final action does not square with the agreed regulatory proposal, then the settlement itself is not effective. The parties return to their original positions as adversaries, and can continue to litigate the dispute.

²³ EPA's unsuccessful motion in 1981 to win release from the extra-statutory requirements of the decree was made on the grounds that:

Extra obligations not required by statute necessarily infringe on EPA's ability to allocate its limited resources in the way it finds best.

....

It is also important for EPA to have the flexibility to reevaluate past administrative actions which are not required by statute but may require substantial resources to implement.

[Continued]

Moreover, as Judge Wilkey pointed out in dissent, the relinquishment by one Administrator of his or her discretion cannot legally bind his or her successors. (718 F.2d 1134, App. A 38a-39a.)²⁴

B. The Question Of Judicial Power Erroneously Decided By The Court Of Appeals Has An Important Bearing On The Continued Interaction Of The Executive, Legislative, and Judicial Branches

If the majority in the court of appeals is correct in its conclusion that consent decrees of the type entered in this case are within a federal district court's article III power, then an agency administrator could enter into such a decree with a private litigant and thereby preclude successive agency officers from exercising their congressionally bestowed discretion by implementing different policies.²⁵ The settling administrator would effectively enshrine his or her views as to the exercise of discretionary authority. In this particular instance, the resulting constraint on agency discretion contravenes Congress' explicit intent that such discretion be available to cope with future is-

²³ [Continued]

Defendants' Memorandum . . . In Support of Defendants' Cross-Motion To Modify The Decree, served August 3, 1981, at 30-31.

The district court's denial of EPA's 1981 motion is encompassed by the petition in this case. *See supra*, at 13-14.

²⁴ As this Court recently observed in a related context (the institutional concerns of the Solicitor General), "the panoply of important public issues raised in governmental litigation may quite properly lead successive Administrations of the Executive Branch to take differing positions with respect to the resolution of a particular issue." *United States v. Mendoza*, 52 U.S.L.W. 4019, 4021 (U.S. Jan. 10, 1984).

²⁵ Judge Wilkey observed that such an agreement could as easily fix in place a specified low level of regulation as go beyond an agency's statutory obligations with regard to regulation, because almost any provisions could pass the vague tests of "public interest" and "consistency" with the general purposes of the underlying statute. (718 F.2d 1135-36, App. A 41a-42a.)

sues which could not be anticipated by Congress at the time the enabling legislation was enacted. *See supra*, at 8-9, quoting Congressman Roberts, floor manager in the House during passage of the 1977 Amendments to the Act.

The question at issue here is by no means academic, or unique to this one case.²⁶ Rather, it has an important bearing on the continued interaction of the Executive, Legislative, and Judicial Branches.²⁷

²⁶ The court of appeals for the D.C. Circuit has, for example, recently faced the issue of the extent to which a judicial order based upon a stipulation or contract by an agency official could prevent his successor from changing course. *National Audubon Society, Inc. v. Watt*, 678 F.2d 299, 301, 305 n.12 (D.C. Cir. 1982). Contractual obligations, however, raise less severe problems than those embodied in a court decree because the power of the court is not implicated so directly. Indeed, if no dispute arises over implementation of a contractual obligation, the courts need not be involved regarding the contract.

²⁷ As Judge Wilkey warned in his dissent, a discretion-constraining decree diminishes both Executive and Congressional power, as well as public participation in administrative processes. (718 F.2d 1136-37, App. A 42a-44a.)

Such a decree would prevent any new policy initiative of the Executive Branch from taking effect without prior judicial approval. Conversely, and perhaps of equal importance, such a consent decree could provide the executive with a vehicle for avoiding responsibility for its administrative programs, thereby lessening agency accountability in the democratic process of government.

Besides negating discretion granted to an officer by Congress in a statute, such a decree also inhibits congressional influence on policy formulation and implementation by an agency. (718 F.2d 1136, App. A 43a (Wilkey, J., dissenting).) The informal give and take with Congress that characterizes the modern administrative process would be stifled because an agency could not respond to congressional concerns without prior approval of the court.

II. THE COURT OF APPEALS ERRED IN RULING THAT THE DECREE WAS NOT SUPERSEDED BY THE 1977 AMENDMENTS TO THE CLEAN WATER ACT AND THAT THE DECREE WAS ENFORCEABLE NOTWITHSTANDING MOOTNESS OF VIRTUALLY ALL OF THE UNDERLYING CAUSES OF ACTION

Two other questions decided by the court of appeals also merit review by this Court. In its preliminary decision of September 1980, the court of appeals concluded that the decree in this case was not superseded by the 1977 Amendments to the Clean Water Act, notwithstanding the explicit statements to the contrary by Congressman Roberts, the floor manager of the Conference Report in the House (*see supra*, at 8-9), as well as other indicia of legislative intent. *Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 1233-44 (D.C. Cir. 1980), App. A 56a-71a. In addition, the court of appeals decided that the decree was fully enforceable and that the causes of action underlying the decree were not moot because a remnant of controversy remained regarding criteria adopted in 1973 to list pollutants as toxic and also because allegations in the complaints regarding pretreatment standards had been subsumed in the "comprehensive interrelated package" of provisions in the decree. (636 F.2d 1248, App. A 78a.) These rulings are erroneous and deserve review by this Court because of the considerable continuing effect of the decree on the Agency's regulatory actions under the Clean Water Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

UNION CARBIDE CORPORATION,
FMC CORPORATION,
MONSANTO COMPANY,
EXXON CORPORATION,
AMERICAN MINING CONGRESS,
AMERICAN IRON & STEEL INSTITUTE,
AND AMERICAN PETROLEUM INSTITUTE,
Petitioners,
v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
ENVIRONMENTAL DEFENSE FUND, INC.,
CITIZENS FOR A BETTER ENVIRONMENT,
AND BUSINESSMEN FOR THE PUBLIC INTEREST, INC.,
Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1365

CITIZENS FOR A BETTER ENVIRONMENT
DENNIS L. ADAMCZYK

v.

ANNE GORSUCH, ADMINISTRATOR, U.S.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

AMERICAN IRON AND STEEL INSTITUTE,
UNION CARBIDE CORPORATION,
FMC CORPORATION,
DOW CHEMICAL COMPANY,
CELANESE COMPANY,
E.I. DU PONT DE NEMOURS AND COMPANY,
EXXON CORPORATION,
MONSANTO CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
AMERICAN MINING CONGRESS,

Appellants

2a

No. 82-1366

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

v.

JAMES I. AGEE, IN HIS OFFICIAL CAPACITY
AS ASSISTANT ADMINISTRATOR FOR WATER AND
HAZARDOUS MATERIALS ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

AMERICAN IRON AND STEEL INSTITUTE,
UNION CARBIDE CORPORATION,
FMC CORPORATION,
DOW CHEMICAL COMPANY,
CELANESE COMPANY,
E.I. DU PONT DE NEMOURS AND COMPANY,
EXXON CORPORATION,
MONSANTO CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
AMERICAN MINING CONGRESS,

Appellants

No. 82-1367

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
A NON-PROFIT NEW YORK CORPORATION, ET AL.

v.

ANNE M. GORSUCH, AS ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

AMERICAN IRON AND STEEL INSTITUTE,
UNION CARBIDE CORPORATION,
FMC CORPORATION,
DOW CHEMICAL COMPANY,
CELANESE COMPANY,
E.I. DU PONT DE NEMOURS AND COMPANY,
EXXON CORPORATION,
MONSANTO CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
AMERICAN MINING CONGRESS,

Appellants

No. 82-1368

ENVIRONMENTAL DEFENSE FUND, INC.,
A NON-PROFIT NEW YORK CORPORATION, ET AL.

v.

ANNE M. GORSUCH, AS ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

AMERICAN IRON AND STEEL INSTITUTE,
UNION CARBIDE CORPORATION,
FMC CORPORATION,
DOW CHEMICAL COMPANY,
CELANESE COMPANY,
E.I. DU PONT DE NEMOURS AND COMPANY,
EXXON CORPORATION,
MONSANTO CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
AMERICAN MINING CONGRESS,

Appellants

No. 82-1673

NATURAL RESOURCES DEFENSE COUNCIL, INC.
A NON-PROFIT NEW YORK CORPORATION, ET AL.

v.

ANNE M. GORSUCH, AS ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY
AMERICAN IRON AND STEEL INSTITUTE,
UNION CARBIDE CORPORATION,
FMC CORPORATION,
DOW CHEMICAL COMPANY,
CELANESE COMPANY,
E.I. DU PONT DE NEMOURS AND COMPANY,
EXXON CORPORATION,
MONSANTO CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
AMERICAN MINING CONGRESS,

Appellants

No. 82-1674

NATURAL RESOURCES DEFENSE COUNCIL, INC.

v.

JAMES I. AGEE, IN HIS OFFICIAL CAPACITY
AS ASSISTANT ADMINISTRATOR FOR WATER AND
HAZARDOUS MATERIALS ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

AMERICAN IRON AND STEEL INSTITUTE,
UNION CARBIDE CORPORATION,
FMC CORPORATION,
DOW CHEMICAL COMPANY,
CELANESE COMPANY,
E.I. DU PONT DE NEMOURS AND COMPANY,
EXXON CORPORATION,
MONSANTO CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
AMERICAN MINING CONGRESS,

Appellants

No. 82-1675

ENVIRONMENTAL DEFENSE FUND, INC.,
A NON-PROFIT NEW YORK CORPORATION, ET AL.

v.

ANNE M. GORSUCH, AS ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY
AMERICAN IRON AND STEEL INSTITUTE,
UNION CARBIDE CORPORATION,
FMC CORPORATION,
DOW CHEMICAL COMPANY,
CELANESE COMPANY,
E.I. DU PONT DE NEMOURS AND COMPANY,
EXXON CORPORATION,
MONSANTO CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
AMERICAN MINING CONGRESS,

Appellants

5a

No. 82-1676

CITIZENS FOR A BETTER ENVIRONMENT, ET AL.

v.

ANNE M. GORSUCH, ADMINISTRATOR, U.S.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

AMERICAN IRON AND STEEL INSTITUTE,
UNION CARBIDE CORPORATION,
FMC CORPORATION,
DOW CHEMICAL COMPANY,
CELANESE COMPANY,
E.I. DU PONT DE NEMOURS AND COMPANY,
EXXON CORPORATION,
MONSANTO CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
AMERICAN MINING CONGRESS,

Appellants

No. 82-1770

NATURAL RESOURCES DEFENSE COUNCIL,
INC., ET AL.

v.

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ALABAMA POWER COMPANY, ET AL.,

Appellants

No. 82-1771

NATURAL RESOURCES DEFENSE COUNCIL,
INC., ET AL.

v.

JAMES I. AGEE, IN HIS OFFICIAL CAPACITY
AS ASSISTANT ADMINISTRATOR FOR WATER AND
HAZARDOUS MATERIALS ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

ALABAMA POWER COMPANY, ET AL.,

Appellants

No. 82-1772

CITIZENS FOR A BETTER ENVIRONMENT, ET AL.

v.

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ALABAMA POWER COMPANY, ET AL.,
Appellants

No. 82-1773

ENVIRONMENTAL DEFENSE FUND, INC.,
A NON-PROFIT NEW YORK CORPORATION, ET AL.

v.

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ALABAMA POWER COMPANY, ET AL.,
Appellants

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action Nos. 75-01698, 75-01267,
73-02153 & 75-00172)

Argued March 1, 1983

Decided October 4, 1983

Charles L. Lettow, with whom Douglas E. Kliever, Michael A. Wiegard, Douglas E. McAllister, Richard E. Schwartz, Stark Ritchie, James K. Jackson, Arnold S. Block, Michael B. Barr and Scott Slaughter were on the brief, for appellants.

Barry S. Neuman, Attorney, Department of Justice, with whom *Peter R. Steenland, Jr.*, *Nancy B. Firestone*, Attorneys, Department of Justice, *Michael Brown*, Deputy General Counsel, Environmental Protection Agency, *Bruce M. Diamond*, Acting Associate General Counsel, and *Susan G. Lepow*, Assistant General Counsel, Environmental Protection Agency, were on the brief, for appellees, *Anne M. Gorsuch, et al.* *Donald W. Stever*, Attorney, Department of Justice, also entered an appearance for appellees, *Anne M. Gorsuch, et al.*

Ronald J. Wilson, with whom *J. Taylor Banks* was on the brief, for appellees, Natural Resources Defense Council, Inc., et al.

William Scott Ferguson, entered an appearance for appellees, Olin Corporation in 82-1365, 82-1366, 82-1367 and 82-1368.

Before: WILKEY and WALD, Circuit Judges, and BON-
SAL,* Senior District Judge for the Southern
District of New York.

Opinion for the Court filed by Senior District Judge
BONSAL.

Dissenting opinion filed by Circuit Judge WILKEY.

BONSAL, District Judge: The intervenors in these consolidated cases, several corporations and trade associations (collectively "the Companies"),¹ appeal from orders of the United States District Court, Flannery, J., (1) denying their motion to vacate or, alternatively, to revise a settlement agreement ("the Agreement") previously

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

¹ These include the American Iron and Steel Institute, Union Carbide Corp., FMC Corp., Dow Chemical Co., Celanese Co., E.I. DuPont de Nemours & Co., Exxon Corp., Monsanto Corp., the American Petroleum Institute, the American Mining Congress, and numerous utility companies.

approved by the district court, and (2) denying the cross-motion of the Environmental Protection Agency ("EPA" or "the Agency") and its Administrator to modify the Agreement due to changed circumstances. The issue presented by this appeal, as formulated in our earlier opinion, *Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 1259 (D.C. Cir. 1980),² is whether the "settlement agreement impermissibly infringes on the discretion Congress committed to the Administrator to make certain decisions under the [Clean Water Act]." For the reasons hereinafter stated, we hold that the Agreement does not impermissibly infringe on the Administrator's discretion and accordingly we affirm the orders of the district court.

BACKGROUND

The facts are set forth in some detail in our prior decision, 636 F.2d at 1234-38, familiarity with which is assumed. Briefly, the Agreement was entered into by the original parties³ to these consolidated cases in settlement of the plaintiffs' claims that EPA had failed to carry out its statutory duty to implement certain provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (1976), known in its amended form as the Clean Water Act ("CWA" or "the Act").⁴ Following negotiations between the parties, the proposed settlement agreement was submitted to the district court, which held

² Other aspects of these cases were addressed in *Natural Resources Defense Council, Inc. v. Costle*, 561 F.2d 904 (D.C. Cir. 1977).

³ The plaintiffs are the Natural Resources Defense Council, Inc., the Environmental Defense Fund, Inc., the National Audubon Society, Inc., Citizens for a Better Environment, Inc., and Business and Professional People for the Public Interest, Inc. (collectively "NRDC"). The defendants are William Ruckelshaus, Administrator of EPA, and the Agency itself.

⁴ The provisions involved are sections 301-304, 306, 307 and 402, codified at 33 U.S.C. §§ 1311-1314, 1316, 1317, and 1342.

hearings and received comments from the intervenor Companies, which opposed it. The Agreement was authorized and executed for the government by both EPA and the Department of Justice. After making some changes in the agreement, on June 9, 1976 the court entered a "Final Order and Decree" ("the Decree") approving it as a "just, fair, and equitable resolution of the issues raised." *Natural Resources Defense Council, Inc. v. Train*, 8 Env't Rep. Cas. (BNA) 2120, 2122 (D.D.C. 1976). No appeal was taken from the Decree. Therefore, the issue of whether, in a general sense, the district court acted properly in entering the June 9, 1976 Decree is not now before us.⁵

The Agreement contains a detailed program for developing regulations to deal with the discharge of toxic pollutants under the CWA. It required EPA to promulgate guidelines and limitations governing the discharge by 21 industries of 65 specified pollutants. It also mandated the use of certain scientific methodologies and decision-making criteria by EPA in determining whether additional regulations should be issued and whether other pollutants should be included in the regulatory scheme. It did not specify the substantive result of any regulations EPA was to propose and only required EPA to initiate "regulatory action" for other pollutants identified through the research program. The regulations envisaged by the Agreement were, after full notice and comment, to be promulgated in phases by December 31, 1979 and the industries affected were to comply with them by June 30, 1983.

⁵ Had the Companies appealed from the Decree, the scope of our review would have been narrow. "The district court's approval of a proposed settlement by consent decree should be reversed only if its approval is an abuse of the district court's discretion." *United States v. City of Miami, Florida*, 664 F.2d 435, 442 (5th Cir. 1981) (en banc) (plurality opinion); accord *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1015 (7th Cir. 1980); *Patterson v. Newspaper & Mail Deliverers' Union*, 514 F.2d 767, 771 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976).

The district court explained in its Decree that the Companies would be free to influence the content of the proposed regulations by participating in the rulemaking proceedings and then could attack the legality of any final regulations in court. 8 Env't Rep. Cas. at 2121. The court also emphasized that EPA and NRDC had modified the Agreement to make clear that the court would not review EPA's "substantive judgments" under it. *Id.*

When EPA's implementation of the Agreement failed to meet the deadlines imposed therein, NRDC moved to have the Administrator held in contempt. Soon after, the Companies moved to vacate the Decree on the grounds that the 1977 Amendments to what became known as the CWA had superseded the Decree and rendered it moot, and that the Decree violated the Administrative Procedure Act's notice and comment provisions. EPA and NRDC then jointly moved for an order modifying the Decree in settlement of NRDC's contempt motion. On March 9, 1979 the district court modified the Decree according to EPA's and NRDC's request and denied the Companies' motion to vacate the Decree. *Natural Resources Defense Council, Inc. v. Costle*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C. 1979). In general, the modifications granted EPA more time and flexibility to implement the requirements of the Decree in exchange for requiring EPA to provide NRDC more detailed information regarding implementation. Several of the Companies appealed the District court's decision, which we affirmed. We found that Congress did not intend the 1977 Amendments to supersede the Decree, that the district court continued to have the power to enforce the Decree, and that the modifications in the Decree were not "rules" within the meaning of the APA for which EPA had to provide notice and comment. *Environmental Defense Fund, Inc. v. Costle, supra*, 636 F.2d at 1244, 1251, 1255-56. However, we remanded the case for the district court to consider whether the settlement agreement impermissibly infringes on the discretion Congress committed to the

EPA Administrator to make certain decisions under the CWA. *Id.* at 1258-59.

On remand, the Companies filed a motion to vacate or, alternatively, to revise the Decree on the ground that it impermissibly infringed upon the Administrator's discretion under the CWA. EPA filed a cross-motion to modify the Decree in light of changed circumstances, seeking to extend certain deadlines and to delete from the Decree those provisions compelling the performance of "discretionary" actions by the Agency.

In a memorandum opinion filed February 5, 1982, the district court found that the Agreement "does not impermissibly infringe upon the discretion accorded to the EPA Administrator by Congress." *Natural Resources Defense Council, Inc. v. Gorsuch*, 16 Env't Rep. Cas. (BNA) 2084, 2090 (D.D.C. 1982). Accordingly, it entered an order on the same date denying the Companies' motion. The district court based its decision on five factors. First, it stressed the breadth of a district court's equitable power to give effect to remedial statutes. Second, it concluded that the Decree was "process" rather than "result" oriented. Third, it pointed out that the parties had participated extensively in formulating the Decree. Fourth, it noted that it had taken a flexible approach to fashioning the Decree, modifying it a number of times in response to objections raised by the parties. Finally, it found that Congress had the Decree in mind when it enacted the 1977 Amendments to the CWA and "clearly approved of its procedures." *Id.* at 2087-89.

On May 7, 1982 the district court issued a second order, denying EPA's cross-motion and directing the Agency to submit proposed schedules for promulgating within one year all those regulations envisaged by the Agreement which had not yet been promulgated.* The

* On June 21, 1982 EPA moved pursuant to Fed.R.Civ.P. 60(b) for an order modifying the district court's May 7 order so as to give

Companies have appealed from the district court's first order and from that part of the second order which denied EPA's request to delete those portions of the Decree allegedly involving matters entrusted to the Administrator's discretion under the CWA. *EPA has not appealed the denial of that request.*

DISCUSSION

The February 5, 1982 Order

The Companies' principal contentions on appeal are that: (1) the district court had no power to approve the provisions of the Agreement which direct EPA to take actions not required to remedy specific violations of the CWA; and (2) these provisions impermissibly infringe on the EPA Administrator's statutory discretion by precluding him from taking action otherwise open to him under the CWA.

I.

Underlying both these contentions is the distinction drawn by the Companies between "statutory" and "non-statutory" provisions in the Agreement. They maintain that certain provisions in the Agreement flow directly from specific requirements in the Act and hence are "statutory." As to the presence of these provisions in the Decree, the Companies raise no objection.⁷ However,

the Agency more time to promulgate the required regulations. On August 25, 1982 the district court issued an order indicating its willingness to grant EPA's motion if this court were to remand for that purpose, which it did on September 10, 1982. The district court then entered the order on October 26, 1982.

Following oral argument of this appeal, EPA and NRDC jointly moved for an order modifying paragraph 10(b) of the Decree. In an order dated June 10, 1983 the district court found the requested modification consistent with § 307(b) of the CWA, and on July 18, 1983 we remanded to the district court for entry of an order granting the joint motion.

⁷ The Companies identify only Paragraphs 7 and 13 as belonging in this category. In their view, these provisions impose deadlines on

they assert that other provisions, which they refer to as "non-statutory," are not mandated by the Act and thus should have been excluded from the Decree by the district court. The Companies admit that the "non-statutory" provisions could have been included in the Agreement—but not in the Decree.

Amongst the so-called "non-statutory" provisions are ones which "impose criteria not prescribed in the statute for EPA's regulations." Br. for Appellants at 17. Here the Companies cite *inter alia* Paragraph 8 of the Decree, which sets forth criteria for EPA's decision to exclude "specific pollutants" or "point source categories" from proposed regulations.⁸ Under the CWA, EPA is required

EPA for the promulgation of regulations explicitly required by the CWA, and therefore do not impermissibly restrict EPA's statutory discretion. Br. for Appellants at 16-17.

- ⁸ 8.(a) Upon completion of the technology, economic, and public health and ecological data gathering, including contracts, for a point source category listed in Appendix B and prior to publication of proposed regulations for such point source category, the Administrator may exclude from regulation under the effluent limitations and guidelines, standards of performance, and/or pretreatment standards contemplated by this Agreement for such category a specific pollutant for any of the following reasons, based upon information available to him:

(i) Equally or more stringent protection is already provided by an effluent, new source performance, or pretreatment standard or by an effluent limitation and guideline promulgated pursuant to Section(s) 301, 304, 306, 307(a), 307(b) or 307(c) of the Act.

(ii) Except for pretreatment standards, the specific pollutant is present in the effluent discharge solely as a result of its presence in intake waters taken from the same body of water into which it is discharged and, for pretreatment standards, the specific pollutant is present in the effluent which is introduced into treatment works (as defined in Section 212 of the Act) which are publicly owned solely as a result of its presence in the point source's intake waters, *provided however*, that such point source may be subject to an appropriate effluent

to analyze various factors in the course of developing toxic pollutant regulations. Section 307(a)(1) of the Act, 33 U.S.C. § 1317(a)(1), provides that:

limitation for such pollutant pursuant to the requirements of Section 307; or

(iii) the specific pollutant is either not present in the discharge or in the effluent which is introduced into treatment works (as defined in Section 212 of the Act) which are publicly owned or is present only in trace amounts and is neither causing, nor likely to cause, toxic effects with respect to any identifiable organisms affected or likely to be affected by such discharge or effluent.

Such exclusions may also be made following proposal or promulgation of standards whenever information comes to the attention of the Administrator indicating that exclusion for any of the foregoing reasons is warranted.

(b) Upon completion of the technology, economic, and public health and ecological data gathering, including contracts, for a point source category listed in Appendix B and prior to publication of proposed regulations for such point source category, the Administrator may exclude from regulation under the pretreatment standards contemplated by this Agreement all point sources within a point source category or point source subcategory:

(i) if 95 percent or more of all point sources in the point source category or subcategory introduce into treatment works (as defined in Section 212 of the Act) which are publicly owned only pollutants which are susceptible to treatment by such treatment works and which do not interfere with, do not pass through, or are not otherwise incompatible with such treatment works, or

(ii) if

(A) the amount of pollutants introduced by such point sources into treatment works (as defined in Section 212 of the Act) which are publicly owned which pollutants are not susceptible to treatment by such treatment works or interfere with, pass through, or are otherwise incompatible with such treatment works and

(B) the toxicity of such pollutants taken together is so insignificant as not to justify develop-

The Administrator in publishing any revised list [of toxic pollutants subject to regulation] shall take into account toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms.

The Companies contend that because the criteria specified in Paragraph 8 of the Decree are more extensive than those set out in section 307(a) (1) of the Act, the criteria should not be incorporated in the Decree.

Also alleged to be "non-statutory" are provisions which "create programs, not found in the statute, which EPA must now undertake." Br. for Appellants at 18. Here the Companies cite *inter alia* Paragraph 4(c) of the Decree, which requires EPA to "identify and study" additional pollutants (aside from the 65 listed ones) for which pretreatment standards *may* be necessary. Paragraph 4(c) describes in detail how EPA is to fulfill this requirement by implementing a study program to identify other pollutants for which EPA should initiate "regulatory

ing a pretreatment regulation in accordance with the schedules set out in paragraphs 7 and 13 of this Agreement.

(c) Whenever the Administrator decides to exclude a point source category or a specific pollutant from coverage pursuant to this section of this Agreement, he shall promptly serve upon the parties to the captioned cases, or their designated representative or attorney, a statement under oath designating the point source category or subcategory or specific pollutant to be excluded together with the reasons therefore. Such statement shall detail the reasons for the Administrator's exclusion, and shall set forth the data and information forming the basis for the exclusion. Proposed regulations for each point source category or subcategory shall identify each such exclusion, shall summarize the Administrator's statement, and shall invite public comments on such exclusion.

action.”* Paragraph 4(c) appears to leave the scope, substance and particulars of “regulatory action” to EPA’s discretion, as subject to the rulemaking process. Section

- 9 4(c) The Administrator shall establish and implement a program to identify and study other pollutants which are introduced into such treatment works and which are not susceptible to treatment by such works or which interfere with, pass through, or are otherwise incompatible with such works. The program shall, at a minimum, address those pollutants listed in Appendix C identifiable by computer-based mass spectra search programs (“computer matching”), and shall consist of steps to: tentatively identify by computer matching pollutants discharged by point source categories listed in Appendix B; determine frequencies of occurrence and order-of-magnitude concentrations for the tentatively identified pollutants; analytically confirm the computed identification of those pollutants found with significant frequency in at least one subcategory and in high concentrations (the term “high” to be based on comparison with the concentrations of other pollutants found or known to be in the discharge and, where possible, on readily available information with respect to toxicity of the pollutants); determine for those pollutants analytically confirmed, based upon a comprehensive literature search of the latest scientific knowledge, the kind and extent of all identifiable effects on aquatic organisms and human health; develop from the above information a list of pollutants that are candidates for national regulation; determine, by molecular structure analysis and/or laboratory test data and/or field studies, or other appropriate means where practicable, both the probable compatibility of the listed pollutants with treatment works (as defined in Section 212 of the Act) which are publicly owned, and the probable extent to which industrial technology designed to remove pollutants included in Appendix A also will remove listed pollutants. The Administrator may remove pollutants from said pollutant candidate list that he deems to be compatible with publicly owned treatment works or effectively controlled by industrial technology upon which pretreatment standards promulgated pursuant to § 307(b) of the Act are based, or are present in only trace amounts and are neither causing nor likely to cause toxic effects. The Agency shall complete this program by July 1, 1983. Immediately thereafter, the Administrator shall undertake regulatory action for those pollutants remaining on the list.

307(b) of the Act, 33 U.S.C. § 1317(b), which discusses pretreatment standards, states only that EPA must promulgate such standards "[n]ot later than ninety days after . . . publication [of proposed regulations], and after opportunity for public hearing" The Companies complain that the program called for in Paragraph 4(c) "is [not] mentioned in, much less required by, the Act." Br. for Appellants at 19.

NRDC and EPA do not dispute that such provisions as Paragraphs 4(c) and 8 in the Decree are not mandated by the CWA. However, they contend that the programs and criteria specified in the Decree are consistent with the Act and do not bind the Agency to any particular substantive outcome. Instead, the programs and criteria establish analytic processes that EPA must employ in formulating proposed standards. NRDC and EPA both believe that there is a sufficient nexus between the Decree and the Act, even if every provision in the Decree is not derived from a particular requirement of the CWA.

II.

The Companies' first contention, regarding the district court's power to approve the "non-statutory" provisions of the Decree, requires a brief discussion of the principles of law government consent decrees. In *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971), the Supreme Court provided the following analysis:

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they pro-

ceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.

(Footnote omitted). Elsewhere the Supreme Court has stated that

[c]onsent decrees and orders have attributes both of contracts and of judicial decrees or, in this case, administrative orders. While they are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation and must be approved by the court or administrative agency.

United States v. ITT Continental Baking Co., 420 U.S. 223, 236 n.10 (1975). While construction of a consent decree is essentially a matter of contract law, see *United States v. Armour & Co.*, *supra*; *Sportmart, Inc. v. Wolverine World Wide, Inc.*, 601 F.2d 313, 316 (7th Cir. 1979), the decree itself must be treated "as a judicial act." *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). Finally, a district court's "authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." *System Federation No. 91, Railway Employees' Department, AFL-CIO v. Wright*, 364 U.S. 642, 651 (1961).

The district court referred to the Agreement as a "classic settlement." 8 Env't Rep. Cas. (BNA) at 2122. The Agreement certainly follows the principles laid down in *United States v. Armour* and *United States v. ITT Continental Baking*, *supra*. By its terms, EPA achieved its objective of basing the regulation of toxic discharges on a technology-based, industry-by-industry approach instead of a health-based, pollutant-by-pollutant method.

As we have previously noted, the technology-based approach "marked a change in EPA's regulatory strategy" and "offered substantial advantages over the old" one. *Environmental Defense Fund, Inc. v. Costle, supra*, 636 F.2d at 1235-36. In addition, as the district court stated, the Agreement represents a compromise for NRDC insofar as it accepted that EPA could regulate toxic pollutants under section 304 of the Act rather than under the health-based effluent standards called for by section 307, as NRDC's complaint had alleged. 8 Env't Rep. Cas. (BNA) at 2122. At the same time, NRDC also benefited from the Agreement, which bound EPA to promulgate regulations without specifying the exact substance of those regulations according to a fixed timetable for a specified list of pollutants.

Nevertheless, the Companies contend that, while EPA was free to dispose of this litigation by entering into the Agreement with NRDC, the district court had no authority to enforce those parts of it which "go beyond statutory requirements." Br. for Appellants at 26. They assert that since, under *System Federation No. 91 v. Wright, supra*, the court's authority to approve the Agreement "comes only" from the CWA, each provision in the Agreement must be necessary to remedy a specific violation of the Act. In other words, the district court was permitted only to remedy those wrongs which it could specifically identify.

We think that this view of a court's power to adopt a consent decree is unduly narrow. The rule contended for by the Companies depends on an overly literal reading of *System Federation No. 91 v. Wright*. The statement that a district court's "authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," 364 U.S. at 651, means only that the focus of the court's attention in assessing the agreement should be the purposes which the statute is intended to serve, rather than the interests of each party to the settlement.

Before approving the settlement in this case, the district court held hearings and solicited comments, and concluded that the Agreement was "a just, fair, and equitable resolution of the issues raised" in these cases, 8 Env't Rep. Cas. (BNA) at 2122, and that it was "consistent with Congress' intent that water pollution be curbed by 1983." *Id.* The fact that certain provisions in the Decree track the language of the Act more closely than others is irrelevant, so long as all are consistent with it. The Companies' suggested approach would require the court to undertake a close examination of each part of the Decree in order to establish that it was responsive to a specific violation of the Act. This would require, in turn, detailed findings that the Act had been violated in various ways.

However, the long-standing rule is that a district court has power to enter a consent decree without first determining that a statutory violation has occurred. *Swift & Co. v. United States*, 276 U.S. 311, 327 (1928).¹⁰ The

¹⁰ As Justice Brandeis stated in *Swift*:

It is contended that the consent decree was without jurisdiction because it was entered without the support of facts. The argument is that jurisdiction under the Anti-Trust Acts cannot be conferred by consent; that jurisdiction can exist only if the transactions complained of are in fact violations of the Act; that merely to allege facts showing violation of the antitrust laws is not sufficient; that the facts must also be established according to the regular course of chancery procedure; that this requires either admission or proof; and that, here, there was no admission but, on the contrary, a denial of the allegations of the bill, and a recital in the decree that the defendants maintain the truth of their answers, assert their innocence, and consent to the entry of the decree without any finding of fact, only upon condition that their consent shall not constitute or be considered an admission. The argument ignores both the nature of the injunctions . . . and the legal implications of a consent decree. The allegations of the bill not specifically denied may have afforded ample basis for a decree . . . If the court erred in finding in these allegations a basis for . . . an injunction, its error was of a character ordinarily remediable on appeal. Such

court's duty when passing upon a settlement agreement is fundamentally different from its duty in trying a case on the merits. As we have previously held, "prior to approving a consent decree a court must satisfy itself of the settlement's 'overall fairness to beneficiaries and consistency with the public interest'" *United States v. Trucking Employers, Inc.*, 561 F.2d 313, 317 (D.C. Cir. 1977), quoting *United States v. Allegheny Ludlum Industries*, 517 F.2d 826, 850 (5th Cir. 1975). In a more recent case, the Seventh Circuit has explained the nature of the inquiry to be undertaken by the district court:

The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties.

Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1014 (7th Cir. 1980); accord *United States v. City of Miami, Florida*, 664 F.2d 435, 441 (5th Cir. 1981) (*en banc*); *Franks v. Kroger Co.*, 649 F.2d 1216, 1224 (6th Cir. 1981); *Patterson v. Newspaper & Mail Deliverers' Union of New York*, 514 F.2d 767, 771 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976); *United States v. Ketchikan Pulp Co.*, 430 F.Supp. 83, 86 (D. Alaska 1977); see also *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981); Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 Harv. L. Rev. 1314, 1316 (1959).

an error is waived by the consent to the decree. Clearly it does not go to the power of the court to adjudicate between the parties.

276 U.S. at 327 (citations omitted).

Furthermore, it is precisely the desire to avoid a protracted examination of the parties' legal rights which underlies consent decrees. Not only the parties, but the general public as well, benefit from the saving of time and money that results from the voluntary settlement of litigation. Thus, "[v]oluntary settlement of civil controversies is in high judicial favor." *Autera v. Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969).

In light of these settled principles governing judicial approval of settlement agreements, we see no merit to the distinction drawn by the Companies between "statutory" and "non-statutory" provisions of the Decree. The district court's findings that the Agreement was consistent with the purpose of the CWA and that it fairly resolved the controversy demonstrate that it conscientiously performed the duty of a court when asked to approve a settlement agreement. The focus of the court's inquiry throughout was the Act itself, as *System Federation No. 91* requires. As the court determined, and as EPA itself now urges, the Decree as a whole provides an effective means of carrying out EPA's obligations under the Act, and one that is acceptable to both sides in this dispute. It therefore was clearly within the district court's power to enter the Decree.

The Companies wanted the district court to do more than test whether the Decree complied with the purpose of the Act. The Companies in effect wanted the district court to circumscribe EPA's discretion to implement the CWA by stating that EPA could not enter into this Decree to settle a lawsuit attacking EPA's actions under the Act. If the court had done so, the practical effect would have been to limit EPA's discretion to move forward with its preferred CWA toxic regulation program, which the Decree promoted and protected. We believe the court's role should be more restrained.¹¹

¹¹ It would be especially unfortunate if a lack of judicial restraint stifled the evolution of less adversarial approaches to developing

III.

The Companies' second contention is that the Decree impermissibly infringes on EPA's discretion by dictating the approach to be taken by the Agency in promulgating regulations under the CWA. They claim that "the establishment of criteria and the development of programs within the confines of its regulatory obligations are fundamental aspects of the Agency's discretion under the Act. In the absence of the Decree, EPA could in the exercise of this discretion choose whether or not to establish the criteria and programs which the Decree mandates." Reply Br. for Appellants at 21.

The Companies rely heavily on the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), as support for their argument. In particular, they cite the following passage as evidence that a court has no power to specify the procedures to be utilized by an agency: "The court should . . . not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Id.* at 549. The Companies argue that both the Supreme Court and this court have repeatedly emphasized their intention to prohibit interference by the judiciary with procedural matters committed by statute to an agency's discretion. *See, e.g., Steadman v. SEC*, 450 U.S. 91, 104 (1981); *Chrysler Corp. v. Brown*, 441 U.S. 281, 312-13 (1979); *Sierra Club v. Costle*, 657 F.2d 298, 391-92 (D.C. Cir. 1981); *Natural*

regulations. *See generally* Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L.J. 1 (1982) (describing the costs and frequently unsatisfactory results of the formal rulemaking process and analyzing the possibilities for employing negotiations as a supplemental procedure); *see also* Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 Harv. L. Rev. 1871 (1981).

Resources Defense Council, Inc. v. Train, 510 F.2d 692, 711-12 (D.C. Cir. 1975).

EPA and NRDC advance the same reasons for affirming the district court's decision that were relied on by the district court itself. Conceding that the decree infringes to some extent on EPA's discretion under the CWA, they contend that on the facts of this case the level of infringement is permissible. First, they assert that the Decree, far from prescribing any substantive outcome, merely sets forth procedures designed to remedy the Agency's prior allegedly unlawful actions. Second, they argue that EPA was a "prime formulator" of the Decree and that its judgment is entitled to great deference. Finally, they stress that Congress implicitly determined, by means of the 1977 Amendments to the Act, that the limits placed by the Decree on EPA's discretion were appropriate.

We begin by noting that the infringement of agency discretion issue normally arises in the context of a judicial order disposing of a case on its merits.¹² The issue is framed somewhat differently here because the Decree was entered by the district court *with EPA's consent*. It may well be, as the Companies argue, that "a court has a duty to determine that any consent judgment rendered is within the bounds of its judicial power, notwithstanding

¹² However, in a recent case this Court identified the issue in a different context, that of a pretrial stipulation staying the proceedings. *National Audubon Society, Inc. v. Watt*, 678 F.2d 299, 301 (D.C. Cir. 1981), a decision which features prominently in the appellants' brief, raised the question of "the power of the Executive Branch to restrict its exercise of discretion by contract with a private party." We noted there that the question was "novel and far-reaching" but chose not to address it, resting our decision on other grounds. *Id.* at 305 n.12, 311. Since we interpreted the pretrial stipulation to include an implied durational condition that had occurred, we found that the stipulation no longer bound the parties and it was "unnecessary for us to reach the broad and far reaching constitutional questions" in that case.

the parties' consent." Br. for Appellants at 40. Nevertheless, as the discussion in Part II above indicates, a court fulfills its responsibility in this respect simply by determining that the settlement is consistent with the statute the consent judgment is to enforce and fairly and reasonably resolves the controversy in a manner consistent with the public interest. Thus, the Companies' claim that a court does not have power to fashion consent decrees based upon its perception of the public interest misses the point. The Decree here was largely the work of EPA and the other parties to these suits, not the district court; manifestly, the requirements imposed by the Decree do not represent judicial intrusion into the Agency's affairs to the same extent they would if the Decree were "a creature of judicial cloth." *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 141 (1981).

For this reason, the district court's decision to enter the Decree does not run afoul of the holding in *Vermont Yankee*. As we stated in *Association of National Advertisers v. FTC*, 617 F.2d 611, 619 n.10 (D.C. Cir. 1979):

The Court [in *Vermont Yankee*] held that absent extraordinary circumstances the federal courts cannot upset the products of agency rulemaking on the ground that the agency abused its discretion in failing to provide procedures that the courts rather than Congress or the agency believed necessary. Thus the case restricts the ability of courts to refashion normal rulemaking procedures with judicially-conceived notions of administrative fair play.

In *Vermont Yankee* it was undisputed that the Nuclear Regulatory Commission had fully complied with the procedural requirements of the Administrative Procedure Act. The issue was whether a court could order that agency to afford more procedural rights to license applicants than the APA provided. Here, by contrast, EPA failed to comply with the statutory directive that the Agency promulgate various regulations. The ultimate

issue raised by NRDC's suit, therefore, was what action EPA should be required to take in order to correct that deficiency. Since the solution arrived at was to a considerable extent the work of the Agency itself, and since the district court's role was confined to approving the fairness of the consent decree which incorporates it and ensuring the consistency of the Decree with the Act, *Vermont Yankee's* concern for "judicially-conceived notions of administrative fair play" is inapposite here.

None of the other cases cited by the Companies satisfy us that the Decree impermissibly infringes on the EPA Administrator's statutory discretion. First, none of them involve consent decrees. Second, they do not support the Companies' position in this case. For example, our statement in *Public Service Commission of New York v. Federal Power Commission*, 543 F.2d 757, 833 n.42 (D.C. Cir. 1974), that "a court may not compel an administrative agency to pursue a particular course of action when another is open to it" is quoted out of context by the Companies. As a reading of the rest of the opinion makes clear, "a particular course of action" refers to the agency's final decision on the merits of the question before it. See *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) (holding that this Court had "usurped an administrative function" in deciding that a license should be issued by the FPC without the conditions attached to it by the agency). The Decree here does not prescribe the content of the regulations that EPA must promulgate. Nor does the Decree direct the Agency to enforce the regulations in any particular way.

In *National Association of Postal Supervisors v. United States Postal Service*, 602 F.2d 420 (D.C. Cir. 1979), we held that the district court erred in ordering the Postal Service to maintain a specific salary differential of 25% between management personnel and rank-and-file workers, in light of the fact that the governing statute required only that the differential be "adequate and rea-

sonable." The court's error lay in its failure to recognize the Postal Service's broad discretion over "internal management matters." *Id.* at 432. In *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975), another case involving the federal government's efforts to curb water pollution, we reversed in part a district court order requiring EPA to publish by a fixed date all effluent limitations guidelines mandated by the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1314(b)(1)(A). We held that the district court had erred in setting a deadline for publication of guidelines covering categories of "point sources" not listed in the statute, as Congress had clearly intended to leave such matters to the Agency's discretion. Here we are reviewing an order approving a settlement agreement that EPA voluntarily entered into, rather than an order requiring EPA to take action against its will. Hence our admonition in *Train* concerning the limits of a court's role in effectuating regulatory legislation¹³ is not applicable. Indeed, in this case the Companies want the court to narrow EPA's discretion to settle litigation in a manner that permits EPA to implement the CWA through EPA's preferred approach.

Our decision in *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*) supports the district court's holding. In *Adams* we affirmed a district court order requiring the Secretary of Health, Education, and Welfare to take various steps to end segregation in public schools pursuant to Title VI. The plaintiffs' complaint alleged that HEW had adopted a general policy of seeking voluntary compliance with the statute which amounted to an abdication of its statutory duty. In its appeal, HEW con-

¹³ "Where there has been no violation of a statutory duty, we think the proper course is to confine ourselves to a declaration of the intent of Congress and to give the Administrator latitude to exercise his discretion in shaping the implementation of the Act." 510 F.2d at 711-12.

tended that "although enforcement is required, the means of enforcement is a matter of absolute agency discretion" *Id.* at 1162. We rejected this argument and concluded that, in light of the unequivocal duty imposed on the agency by Title VI, the district court acted properly in directing it to pursue an affirmative enforcement policy. We think our observation in *Adams v. Richardson*, to which we recently referred in *Adams v. Bell*, No. 81-1715, slip op. at 6 n.24, 9 (D.C. Cir. June 10, 1983) (*en banc*) is equally applicable to this case: "[O]ur purpose, and the purpose of the District Court order as we understand it, is not to resolve particular questions of compliance or noncompliance. It is, rather, to assure that the agency properly construes its statutory obligations, and that the policies it adopts and implements are consistent with those duties and not a negation of them." 480 F.2d at 1163-64 (footnotes omitted).¹⁴

Finally, we think that the argument, advanced by EPA and NRDC, that Congress implicitly sanctioned the limited infringement on the Agency's discretion which the Decree entails is well taken. As set out in our prior opinion, 636 F.2d at 1238-45, the legislative history of the 1977 Amendments contains numerous references to the Decree which suggest that "Congress expected the settlement agreement to continue in effect." *Id.* at 1244. We pause to emphasize just one of many: Senator Muskie, chairman of the Senate subcommittee that reviewed

¹⁴ We also noted in *Adams v. Richardson* that "[f]ar from dictating the final result with regard to any of these [school] districts, the order merely requires initiation of a process which, excepting contemptuous conduct, will then pass beyond the District Court's continuing control and supervision." 480 F.2d at 1163 n.5, *quoted in Adams v. Bell*, No. 81-1715, slip op. at 6 n.24 (D.C. Cir. June 10, 1983) (*en banc*). The same may be said of the Decree in this case: it requires EPA to begin the process of formulating regulations in compliance with the Act and describes a methodology to be followed by the Agency, but it leaves the outcome of the process (the substantive regulations) to the Agency's discretion.

EPA's implementation of the Act and floor manager of the Conference Report in the Senate, explained to his colleagues that "[t]he conference agreement was specifically designed to codify the so-called 'Flannery decision,' [a consent decree that] . . . EPA has been implementing." 123 Cong. Rec. 39, 181 (1977), *quoted in Environmental Defense Fund, Inc. v. Costle, supra*, 636 F.2d at 1243. Had Congress felt that the Decree infringed too much on the discretion it had given EPA's Administrator, that sentiment would likely have appeared in the legislative history. The Companies cannot identify any evidence of it, and all we have found is evidence to the contrary.

The May 7, 1982 Order

The Companies also appeal from part of the district court's order of May 7, 1982, denying EPA's cross-motion to modify the Decree in certain respects. EPA itself does not appeal from that decision. The Companies' arguments with respect to this order are similar to the ones they make with respect to the first order. In essence, they contend that the district court erred in declining to exclude from the Decree those provisions which the Companies deem "non-statutory." For the reasons stated above in our review of the February 5 order, we find no error in the district court's order of May 7, 1982.

We note in passing that the Companies' concern that the district court has imposed a "high hurdle to modification of the Decree," Br. for Appellants at 56, appears misplaced. The district court's own assessment of the flexibility with which it has administered the Decree, 16 Env't Rep. Cas. (BNA) at 2089, is borne out by the record. For example, while this appeal was pending, the district court twice considered Rule 60(b) motions by EPA and NRDC to extend certain deadlines for the promulgation of regulations and for compliance by the Companies therewith, and in each case decided to grant the motion. *See note 6 supra.*

CONCLUSION

The settlement agreement between EPA and NRDC does not impermissibly infringe on the EPA Administrator's discretion under the Clean Water Act. Therefore, the district court properly entered the Decree and its orders denying the motions to vacate, revise, or modify the Decree are *affirmed*.

WILKEY, *Circuit Judge*, dissenting: This case comes before this Court again on one issue: does the consent decree impermissibly restrict the discretion of the Administrator of the Environmental Protection Agency? I conclude that it does, and so would modify the decree to restore the agency's discretion.

I. THE LIMITS IMPOSED ON THE ADMINISTRATOR'S DISCRETION

The consent decree at issue in this case is a judicial act.¹ It is not a contractual settlement agreement² or a tentative projection of agency policy. The court shaped it, scrutinizing and even altering its terms.³ The court will be called upon to enforce it, should the agency have a change of heart.⁴

¹ *Pope v. United States*, 323 U.S. 1, 12 (1944); *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932).

² This court has already faced a case which raised similar issues in a contractual context. See *National Audubon Society, Inc. v. Watt*, 678 F.2d 299 (D.C. Cir. 1982). Although the court in that case recognized "potentially serious constitutional questions about the power of the Executive Branch to restrict its exercise of discretion by contract with a private party," *id.* at 301, it resolved the case on other grounds.

³ The memorandum opinion of the lower court makes it perfectly clear that the court did not play merely a passive role in approving a contract forged by other parties, but participated actively in shaping the decree. The court's substantial input into the decree came in part through its quasi-rulemaking in holding hearings on the proposed decree, and in part through its modifications of the decree proposed by the parties. *Natural Resources Defense Council, Inc. v. Gorsuch*, 16 Env't Rep. Cas. (BNA) 2084 (D.D.C. 1982).

⁴ The value of the consent decree, of course, depends on the court's willingness to enforce it should the agency wish to adopt other procedures consistent with the act. The consent decree has no practical significance so long as the agency remains willing to follow voluntarily its provisions.

In undertaking this, or any other, judicial act, the court must heed the limits on the power of an Article III court.⁵ The court's power to adopt a consent decree is limited by the terms of the statute it seeks to enforce.⁶ The court cannot prescribe rules of procedure to an administrative agency,⁷ nor may it enlarge upon the statute's substantive requirements.⁸ In short, the court can only enter as a consent decree such relief as would have been within its jurisdictional power had the case gone to trial.⁹

The case law makes perfectly clear that one sort of judicial relief—commanding the Executive Branch to exercise its administrative discretion in a particular way—exceeds the reach of the federal court. Case after federal case has established that federal courts may not tell the Executive or Legislative Branches how to exercise their discretion.¹⁰ As one court has explained the doctrine:

⁵ *System Federation No. 91 v. Wright*, 364 U.S. 642, 652-53 (1961).

⁶ *Id.*

⁷ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

⁸ *National Association of Postal Supervisors v. United States Postal Service*, 602 F.2d 420 (D.C. Cir. 1979).

⁹ *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 469 F.Supp. 836, 855 (N.D. Ill. 1979), *aff'd*, 616 F.2d 1006 (7th Cir. 1980).

¹⁰ *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (a reviewing court "cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'"); *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331-34 (1976) (setting aside court order requiring the FPC to conduct an investigation); *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) (reversing court order which modified an FPC order granting a license); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 124 (1940) (setting aside lower court order on prior-

This self-imposed limitation on judicial power stems from the doctrine of separation of powers; courts cannot invade the jurisdiction of the other departments of government in matters of policy, and for a court to substitute its judgment or discretion for that of a member of the executive branch would amount to such an invasion.¹¹

The consent decree at issue here cannot be reconciled with this principle. All parties agree on the dispositive issue: the decree does restrict the discretion of the Administrator of the EPA.¹² The consent decree constrains the agency in two basic ways. It requires the agency to apply criteria and standards not found in the Clean Water Act, and it requires the agency to undertake programs that are not required by the statute.

These constraints are not *de minimis*. This is obvious, of course, from the fact that the legitimacy of these restraints is worth litigating. They impose duties on the Administrator that differ in kind as well as in scope from those duties imposed by the Act.

A. Paragraph 4(c)

Paragraph 4(c) of the agreement, for example, requires the agency to "identify and study" additional pollutants to be subject to future pretreatment standards.¹³ The decree specifies with great particularity the meth-

ity in which FCC should consider license applications); *National Assoc. of Postal Supervisors v. United States Postal Service*, 602 F.2d 420 (D.C. Cir. 1979) (setting aside court ordered pay increase).

¹¹ *Hunt v. Government of the Virgin Islands*, 382 F.2d 38, 45 (3rd Cir. 1967).

¹² Brief for Appellants at 16; Brief for Federal Appellees [hereinafter EPA Brief] at 23; Brief for Appellees NRDC [hereinafter NRDC Brief] at 24.

¹³ Joint Appendix (JA) at 160.

ods by which the Administrator must identify a list of pollutants that are "candidates for national regulation," the grounds upon which he may then remove pollutants from this list of "candidates," and then concludes by requiring the Administrator to "undertake regulatory action for those pollutants remaining on the list."

The Clean Water Act, by way of contrast, requires no such precisely delineated regulatory program. Section 307(b) of the Act requires only that the EPA promulgate standards for incompatible pollutants within a specified time period after the enactment of the Federal Water Pollution Control Amendments of 1972 and "from time to time thereafter."¹⁴

B. *Paragraph 8*

Paragraph 8 of the decree similarly sets forth requirements and criteria for removing substances from the list of toxic pollutants.¹⁵ The statutory provision¹⁶ requires the EPA to take into account "toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the organisms in any waters, the importance of the affected organisms, and the nature and effect of the toxic pollutant on such organisms." So long as the Administrator does not act arbitrarily and capriciously, the court cannot vacate his decision. Even if his action is "arbitrary and capricious," the court's power is limited by statute to ordering a redetermination.¹⁷

Paragraph 8 of the consent decree sets forth a different set of criteria for the Administrator to follow. The court decree replaces the "considerations" set forth by the statute with specifically defined circumstances under

¹⁴ 83 U.S.C. § 1317(b) (Supp. V 1981).

¹⁵ JA at 161-163.

¹⁶ 83 U.S.C. § 1317(a) (1) (Supp. V 1981).

¹⁷ *Id.*

which the Administrator may choose not to regulate specific pollutants. The Administrator must regulate the pollutants unless they fit within the alternative categories decreed by the court.¹⁸

C. *Paragraph 12*

Paragraph 12 requires the EPA to establish "a specific and substantial program" to determine if "more stringent" effluent standards are necessary to protect water quality.¹⁹ The decree defines the required program with precision: the Administrator must identify navigable waters which are seriously contaminated by toxic pollutants, identify toxic pollutants for which more stringent limitations may be necessary, and publish a strategy for reducing or eliminating discharges of such pollutants. No such program can be found anywhere in the Act.²⁰

In at least these provisions, the judicial decree imposes duties on the Administrator which are not imposed by the Act itself. The decree thus differs not in degree but in kind from the decree the court might have issued if the case had been tried. At most, the court could have declared that the agency's actions were inconsistent with the statute; at most, the court could have required the agency to perform those functions mandated by the statute. In no circumstances could the court have obliged the agency to take discretionary action which differed from that required by the statute.

¹⁸ JA at 161-163.

¹⁹ JA at 164-165.

²⁰ The agency argues that this paragraph is meant to "integrate" Sections 302, 303 and 307(a) of the Clean Water Act. Brief for Federal Appellees at 23.

However, none of these provisions contains any requirements for establishment of a program and publication of a strategy.

The duties imposed by the court's decree may not be inconsistent with the Act; each action taken by the Administrator under the decree might also conform with the Act. But the Administrator's discretion clearly is fettered—under the Act alone, he could choose to switch to another equally reasonable mode of compliance with the Act; under the consent decree he may not swerve from his judicially appointed course without risking contempt of court charges.

II. THE "PERMISSIBILITY" OF LIMITING THE ADMINISTRATOR'S DISCRETION

The court's decree clearly intruded upon the province of the executive. The court went far beyond merely determining whether the EPA has acted lawfully in implementing the Clean Water Act. It imposed a consent decree consisting in large part of provisions which are neither mandated by the Clean Water Act nor necessary to ensure that the EPA performs its statutory duties.

The trial court and the appellees argue that these constraints on the agency are somehow "permissible."²¹ While some of the arguments advanced in this regard are frivolous,²² others raise serious constitutional and prudential issues.²³

²¹ *Natural Resources Defense Council, Inc. v. Costle*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C.); EPA Brief at 32-39; NRDC Brief at 21-38. The majority finds that the decree does not "impermissibly infringe" on the Administrator's discretion, Majority Opinion at 30, but fails to specify whether it holds that the decree does not infringe upon the Administrator's discretion at all—perhaps because he accepted it—or that the infringement was permissible.

²² The majority opinion, for example, is disingenuous at best when it suggests that refusing to enter a court decree would have infringed upon the agency's discretion. Majority Opinion at 23. Nothing in the concept of "executive discretion" gives an agency a right to the issuance of a court decree upon demand.

²³ The majority finds "well-taken" the argument that Congress has "implicitly sanctioned" the decree. Majority Opinion at 29. Our prior opinion in this case considered this issue at length, and

A. *Process or Result*

The majority argues that those cases forbidding courts to intrude upon an agency's discretion speak only to situations where the court would make "the agency's final decision on the merits of the question before it."²⁴ This claim has two flaws. First, it is not supported by the case law. The prior cases limiting a court's power to intrude upon an agency's discretion dealt with issues as far removed from "final determination on the merits" as the order in which applications should be considered by the agency,²⁵ and the agency's method of gathering evidence.²⁶

More subtly, the argument overstates the distinction between "merits" and "procedural" determinations. Where, as here, the "process" oriented decree requires the creation of new programs the court's decree always will affect substantive agency actions. The consent decree commits the EPA Administrator to certain choices—choices as to priorities, choices as to methods, choices as to allocation of resources. Such choices are not free. By choosing to follow the course of action outlined in the consent decree, the EPA necessarily has incurred certain costs. Some of those costs relate to the balancing of conflicting goals—here, the EPA is committed to a certain level of environmental protection, even though that level of pro-

concluded only that the 1977 amendments to the Act did not supersede the decree. *Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229 (D.C. Cir. 1980). We are content to accept the silence of the Act on the validity of this decree for what it is—silence.

To the extent that the majority argues that Congress has implicitly approved all consent decrees of this type, it fails to avoid the underlying issue: whether either Congress or the courts can delegate executive functions to the judicial branch without violating separation of powers principles.

²⁴ Majority Opinion at 26.

²⁵ *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

²⁶ *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976).

tection might ultimately generate uneconomic costs for the public. Still other costs relate to the EPA's allocation of its own resources. By committing some of its all-too-scarce resources to the programs mandated by the consent decree, the EPA necessarily foregoes developing or enforcing other priorities.

The court, by confining the Administrator's discretion, thus involves itself—subtly but nonetheless inevitably—in issues of agency policy. The EPA, in its unsuccessful bid to be released from the strictures of the decree, made much the same argument to an unsympathetic district court: "Extra obligations not required by statute necessarily infringe on EPA's ability to allocate its limited resources in the way it finds best."²⁷ As the Supreme Court's experience with the "outcome determinative" test in the context of applying *Erie Railroad Co. v. Tompkins*²⁸ goes to show, the line between those acts that decide the merits and those that do not is one the existence of which can be postulated, but not proved.

B. *The Administrator's Consent*

A more superficially appealing argument claims that the agreement does not intrude upon the Administrator's discretion because he has agreed to its terms.²⁹ But, a decree of this type binds not only those present Administrators who may welcome it, but also their successors who may vehemently oppose it. For reasons that ultimately have to do with preserving the democratic nature of our Republic, American courts have never allowed an agency

²⁷ JA at 319.

²⁸ 304 U.S. 38 (1938). For a general discussion of the waxing and waning of the "outcome determinative" test between *Guaranty Trust of New York v. York*, 326 U.S. 99 (1945) and *Hanna v. Plumer*, 380 U.S. 460 (1965), see C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 4504 (1982).

²⁹ Majority Opinion at 25.

chief to bind his successor in the exercise of his discretion.³⁰ Today's majority decision effectively undercuts that line of authority by allowing an Administrator to waive his successor's power of discretion—so long as a court is willing to play accomplice.

C. *The Equitable Powers of the Federal Courts*

The most profoundly troubling of the arguments for the consent decree holds that the court may, as an exercise of its equity powers, take virtually any remedial action it chooses.³¹ Only a rough equity balancing of all the facts of the case would tell whether the court's order was a "permissible" extension of its equity jurisdiction. Here, the argument goes, the court's action was justified as a practical way to resolve vexatious litigation.

This argument fails here for two reasons. First, appellees err in contending that the equity power of the federal courts knows no bounds but necessity.³² Appellees correctly note that in many cases federal courts have exercised broad remedial powers in correcting Constitutional violations. Courts have used their equitable powers to as-

³⁰ See *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206 (1930) (agency position on whether certain children were entitled to interest payments from a statutorily created fund); *West v. Standard Oil Co.*, 278 U.S. 200 (1929) (agency determination as to whether land contained minerals). See also *National Audubon Society, Inc. v. Watt*, 678 F.2d 299, 305 n.12 (D.C. Cir. 1981) (Dictum: general principles as to whether a contract restricting executive discretion can be valid can be drawn from dictum in cases dealing with the constitutional prohibition on state laws impairing the obligation of contracts, from cases upholding one Administration's decision to change a policy adopted by its predecessors; from cases limiting the power of the judiciary, in the absence of any contract, to direct the executive in the exercise of its discretion; and from cases holding that particular contracts made by one Administration were binding on the next.)

³¹ NRDC Brief at 18-41.

³² *Id.* at 19.

sume administrative and legislative roles, supervising in a highly active and intrusive manner prisons, school systems, mental hospitals and electoral apportionment.³³

In those cases, however the court invariably acts against state governments or individual citizens. Those decisions in which the court seizes the broadest powers are also those in which it declares that the doctrine of separation of powers does not apply "vertically" when courts act under the Supremacy Clause.³⁴ In the case at issue, the court acts against a coordinate and co-equal branch of government. The court cannot take refuge in the Supremacy Clause. The court must face head-on the separation of powers issue.

The court's infringement on the agency's discretion resolves that issue. The court here acts as an Administrator. It acts without any statutory or constitutional mandate; the contested provisions of the decree admittedly exceed what could be required by the statute. To permit the court's equity powers to extend so far would abolish the principle of separation of powers.

The argument also fails because even if the court's equity power might conceivably support the decree at

³³ See, e.g., *James v. Wallace*, 406 F.Supp. 318 (M.D. Ala. 1976), *aff'd in part, remanded in part sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915, *judgment reversed in part, Alabama v. Pugh*, 438 U.S. 781 (1978); *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1969), *modified per curiam on rehearing en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967). See generally, *Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); *Diver, The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979).

³⁴ *Elrod v. Burns*, 427 U.S. 347, 352 (1976) ("[T]he separation-of-powers principle, like the political-question doctrine, has no applicability to the federal judiciary's relationship to the States.") See generally, *Nagel, Separation of Powers and the Scope of Federal Equitable Remedies*, 80 STAN. L. REV. 661 (1978).

issue, the court still should ask whether its exercise of power is prudent. In this case of first impression, that prudential inquiry must necessarily ask whether this new device for agency administration will prove wise over time. A look at this procedural innovation suffices to show that government by consent decree is not only unconstitutional but unwise.

First, any legitimate purpose served by the decree could have been accomplished by other means. The agency did not need a consent decree in order to take the actions mandated by the decree. Since those actions were within its discretion it could have pursued a course of action precisely identical to that called for by the court order.

Nor did the agency need a consent decree to lend some stability to its position. The agency could have, by undertaking proper notice and comment rulemaking, issued the substance of the consent decree as regulations.²³ Such a course of action would give all parties affected by the proposed programs a chance to be heard, as well as bind the agency not to change course "arbitrarily and capriciously."²⁴

The flaws with government by consent decree run deeper than the superfluity of the device. The device invites abuse—intentional or unintentional. Today's action may seem desirable to some because it requires a sometimes recalcitrant agency operating under a relatively precise statute to provide more of what many see as an unmitigated social good—environmental regulation. The device can just as easily be used, however, to establish regulatory "processes" which guarantee the bare mini-

²³ The agency could also have agreed to issue proposed regulations, with the litigation held in abeyance pending the issuance of the regulations.

²⁴ *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2364, 2365 (1983).

mum of regulation⁸⁷ or which enable regulated industries to evade prosecution. Nor is the device limited to the EPA. Under the typical broad and imprecise administrative statute, almost any agency action would pass the majority's vague test that the decree somehow be "consistent" with the law. An inattentive or unprincipled court could thus bind successive administrations to a non-statutory, limiting "process" of regulatory action.

The abuses to which this device can be put are limited only by the almost inexhaustible imaginations of litigants. The same sorts of "procedural" agreements that the majority finds so innocuous could be used to limit the manner in which an agency goes about seeking evidence or to constrain the investigative practices of federal agencies. EPA and OSHA, for example, could consent not to conduct on site inspections without first rendering 60 days notice. Such a "procedural" agreement would be fully acceptable under the majority's approach; in practice, it would limit the effectiveness of the agencies.

The greatest evil of government by consent decree, however, comes from its potential to freeze the regulatory processes of representative democracy. At best, even with the most principled and fair-minded courts, the device adds friction.

First, the device makes far more difficult the task of those citizens who wish to monitor agency actions and influence their development. This court has previously ruled that the consent decree at issue here does not rise to the level of a rulemaking. That may or may not be good law. In any case, however, the consent decree binds the agency, and binds it in some ways even more than a

⁸⁷ According to the EPA itself, this decree allows the agency to defer certain statutorily required programs longer than they might have been able to do if the court had strictly enforced the statute. EPA Brief at 12-16. The imposition of programs not required by the statute thus was a trade-off for not imposing tight deadlines for programs required by the statute.

rule would. An agency can abandon a rule so long as the change in policy is not arbitrary and capricious;²² an agency cannot escape a consent decree without the active participation and approval of the court.

The commitment that occurs through a consent decree takes place, however, without recourse to the public notice requirements of notice and comment rulemaking. Those third parties who wish to know of such consent decrees would be faced with the nearly impossible task of monitoring all of the nation's district courts. Even then, if the filing of the suit and the consent decree coincide closely in time, notice would amount only to learning that the binding decree is a *fait accompli*.

Second, government by consent decree inhibits Congressional influence on agency policy. No longer could an agency freely and voluntarily respond to Congressional concerns; action would be impossible without prior approval of the court. The informal give-and-take between Congress and the agencies that characterizes modern administrative practice would be squeezed out by the court's assumption of control.

Third, Executive Branch control over agency policy would be hindered. So long as a consent decree remained in force, no new policy spurred by a change in administrations (or prompted by a desire to avoid a change in administrations) could take effect without the prior blessing of the court. Conversely, the consent decree provides the executive with a vehicle for avoiding responsibility for its programs.

This weakening of democratic control over agency policy accompanies an increase in the power of two non-democratic groups. Government by consent decree enshrines at its very center those special interest groups who are party to the decree. They stand in a strong tac-

²² *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856, 2865 (1983).

tical position to oppose changing the decree, and so likely will enjoy material influence on proposed changes in agency policy.

Standing guard over the whole process is the court, the one branch of our government which is by design least responsive to democratic pressures and least fit to accommodate the many and varied interests affected by the decree. The court can neither effectively negotiate with all the parties affected by the decree, nor ably balance the political and technological trade-offs involved. Even the best-intentioned and most vigilant court will prove institutionally incompetent to oversee an agency's discretionary actions.

As a policy device, then, government by consent decree serves no necessary end. It opens the door to unforeseeable mischief; it degrades the institutions of representative democracy and augments the power of special interest groups. It does all of this in a society that hardly needs new devices that emasculate representative democracy and strengthen the power of special interests.

I see no need and no warrant for countenancing this raid on the powers of the Executive Branch. I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1473

ENVIRONMENTAL DEFENSE FUND, INC.,
a Nonprofit New York Corporation, *et al.*

v.

DOUGLAS M. COSTLE, as Administrator,
Environmental Protection Agency, *et al.*

AMERICAN IRON AND STEEL INSTITUTE *et al.*,
Appellants

No. 79-1474

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*

v.

DOUGLAS M. COSTLE, as Administrator,
Environmental Protection Agency, *et al.*

AMERICAN IRON AND STEEL INSTITUTE *et al.*,
Appellants

No. 79-1475

NATURAL RESOURCES DEFENSE COUNCIL, INC.

v.

JAMES I. AGEE, as Assistant Administrator
for Water and Hazardous Materials,
Environmental Protection Agency, *et al.*

AMERICAN IRON AND STEEL INSTITUTE *et al.*,
Appellants

No. 79-1476

CITIZENS FOR A BETTER ENVIRONMENT AND
DENNIS L. ADAMCZYK

v.

DOUGLAS M. COSTLE, as Administrator,
Environmental Protection Agency, *et al.*
AMERICAN IRON AND STEEL INSTITUTE *et al.*,
Appellants

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Actions Nos. 75-0172, 2153-73,
75-1267, and 75-1698)

Argued March 25, 1980

Decided September 16, 1980

Richard E. Schwartz, with whom *Thomas L. Anderson* was on the brief, for appellant American Iron and Steel Institute.

Charles F. Lettow for appellants Firestone Tire and Rubber Company *et al.*

Douglas E. Kliever and *Mary W. Ennis* were on the brief for appellants Union Carbide Corporation *et al.*

Jacqueline M. Warren entered an appearance for appellees Environmental Defense Fund, Inc. *et al.*

James T. Banks, with whom *Ronald J. Wilson* was on the brief, for appellees Natural Resources Defense Council, Inc. *et al.*

Steven Schatzow, Deputy Associate General Counsel, Environmental Protection Agency, with whom *James W.*

Moorman, Assistant Attorney General, and *Jacques B. Gelin* and *Michael A. McCord*, Attorneys, Department of Justice, were on the brief, for appellee Environmental Protection Agency. *E. J. Shawaker*, Attorney, Department of Justice, and *Richard G. Stoll*, Attorney, Environmental Protection Agency, also entered appearances for appellee Environmental Protection Agency.

Before *WRIGHT*, Chief Judge, and *SWYGERT** and *ROBINSON*, Circuit Judges.

Opinion for the court filed by Chief Judge *WRIGHT*.

WRIGHT, Chief Judge: A group of companies in the chemical, petroleum, rubber, and steel industries¹ and an industry association² (collectively "the Companies") appeal from a District Court order denying their motion to vacate a settlement agreement (the Agreement) previously adopted by the court,³ and granting a motion for modification of the settlement agreement filed by the signatories to the Agreement—five environmental groups⁴ and the Environmental Protection Agency (EPA or Agency). *Natural Resources Defense Council, Inc. v. Costle*, 12 ERC 1833 (D.D.C. 1979). The Companies contend that the settlement agreement must be vacated both because it has been superseded by legislation en-

* Of the Seventh Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a) (1976).

¹ The companies are Union Carbide Corp., FMC Corp., Dow Chemical Co., E. I. DuPont de Nemours & Co., Celanese Co., Olin Corp., Monsanto Corp., Exxon Corp., Shell Oil Co., Firestone Tire & Rubber Co., and B. F. Goodrich Co.

² The American Iron and Steel Institute.

³ *Natural Resources Defense Council, Inc. v. Train*, 8 ERC 2120 (D.D.C. 1976).

⁴ The environmental groups are the Natural Resources Defense Council, Inc., Environmental Defense Fund, Inc., National Audubon Society, Inc., Citizens for a Better Environment, Inc., and Business and Professional People for the Public Interest, Inc.

acted by Congress in 1977, and because each of the lawsuits that were resolved by the Agreement is now moot and must be dismissed. The Companies further contend that in proposing the modifications to the settlement agreement approved by the District Court EPA violated rulemaking and public participation requirements of the Administrative Procedure Act, the Clean Water Act, and its own regulations, as well as requirements of constitutional due process.

I.

Between 1973 and 1975 five environmental groups (collectively "NRDC") brought four separate lawsuits against EPA to rectify the Agency's alleged failure to implement several provisions of the statute then known as the Federal Water Pollution Control Act (FWPCA). 33 U.S.C. § 1251 *et seq.* (1976).⁵ The first lawsuit challenged the criteria EPA was using to decide which pollutants to include in a list of toxic pollutants the Agency was required to compile by Section 307(a) of the FWPCA, and also sought to expand EPA's then existing list of toxic pollutants (the toxic criteria case).⁶ The second and third lawsuits were aimed at compelling EPA

⁵ The Federal Water Pollution Control Act was enacted in 1972. Pub. L. No. 92-500. As amended in 1977 the statute is now referred to as the Clean Water Act. Pub. L. No. 95-217.

⁶ *Natural Resources Defense Council, Inc. v. Train*, Civil Action No. 2153-73 (D.D.C.). Section 307(a) of the FWPCA then provided in pertinent part:

The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter revise) a list which includes any toxic pollutant or combination of such pollutants for which an effluent standard (which may include a prohibition of the discharge of such pollutants or combination of such pollutants) will be established under this section.

33 U.S.C. § 1317(a) (1) (1976). At the time EPA's list included only nine substances and NRDC's complaint listed 25 other compounds it wanted included in the list.

to promulgate effluent discharge standards for the substances already on the Agency's list of toxic pollutants (the deadlines cases).⁷ The fourth lawsuit sought an order requiring EPA to promulgate pretreatment standards under Section 307(b) of the FWPCA covering approximately 35 industries and a wide variety of pollutants (the pretreatment case).⁸

While these lawsuits were pending EPA officials conducted a thorough review of the Agency's strategy for controlling toxic pollutant emissions. They concluded that there was a need to replace the Agency's then existing approach with a new strategy calling for an integrated program for controlling toxic pollutants. Furthermore, EPA officials felt that development of the new approach could provide a basis for resolving the controversies between the environmental groups and the Agency.⁹ After the general outlines of the new program were developed

⁷ *Environmental Defense Fund, Inc. v. Train*, Civil Action No. 75-0172 (D.D.C.), and *Citizens for a Better Environment, Inc. v. Train*, Civil Action No. 75-1698 (D.D.C.). Under the statutory scheme EPA was required to promulgate final effluent standards for the listed substances within one year of listing them. 33 U.S.C. § 1317(a)(2) (1976). EPA had published proposed standards for the pollutants on its list but decided not to issue final standards when comments on the proposed standards revealed major flaws in the Agency's analysis. See R. Hall, *The Evolution and Implementation of EPA's Regulatory Program to Control the Discharge of Toxic Pollutants*, 10 NAT. RES. LAW 507, 514-515 (1977).

⁸ *Natural Resources Defense Council, Inc. v. Aches*, Civil Action No. 75-1267 (D.D.C.). Under § 307(b) of the FWPCA, EPA was required to publish within nine months of October 18, 1972 "proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works * * * which are publicly owned for those pollutants which are determined not to be susceptible to treatment by * * * or which would interfere with the operation of such treatment works." 33 U.S.C. § 1317(b)(1) (1976). Final pretreatment standards were to be promulgated within 90 days of publishing proposed standards. *Id.*

⁹ See R. Hall, *supra* note 7, at 515-519.

EPA and NRDC, joined by four industry intervenors in one of the lawsuits,¹⁰ began settlement negotiations. After tentative agreement was reached between EPA and NRDC a proposed settlement agreement was submitted to the District Court.¹¹ The District Court held several hearings on the proposed agreement and allowed interested parties to file comments on it. The Companies intervened in the proceedings in the District Court and filed comments vigorously opposing the proposed agreement.¹² After requiring several modifications the District Court approved the settlement agreement, finding it a "just, fair, and equitable resolution of the issues raised." *Natural Resources Defense Council, Inc. v. Train*, 8 ERC 2120, 2122 (D.D.C. 1976).¹³ No appeal was taken from the court's order adopting the settlement agreement.

The settlement agreement outlined a comprehensive strategy for regulation of toxic pollutant discharges under the FWPCA, including details concerning the timing, scope, and nature of the regulatory programs EPA agreed to initiate. Insofar as is relevant to the instant case, EPA proposed to regulate discharge of toxic pollutants by developing effluent limitations, guidelines, and

¹⁰ The American Iron and Steel Institute, the American Petroleum Institute and member companies, the National Coal Association, and American Cyanamid Company intervened in *Environmental Defense Fund, Inc. v. Train*, *supra* note 7, shortly after the lawsuit was brought.

¹¹ EPA briefed the staffs of the Office of Management and Budget, the Water Resources Subcommittee of the House Public Works Committee, and the Environmental Pollution Subcommittee of the Senate Public Works Committee about these negotiations. See R. Hall, *supra* note 7, at 519.

¹² In all, comments and objections to the proposed settlement agreement were filed by 20 major industries and trade associations. *Id.*

¹³ The Agreement was signed by EPA, the five environmental groups, and the National Coal Association, and was incorporated by reference in a consent decree signed by the District Court.

performance standards for new and existing emission sources, as well as pretreatment standards regulating introduction of pollutants into treatment works. These limitations, guidelines, and standards were to cover 21 major industries and 65 specified pollutants or groups of pollutants. In promulgating effluent limitations and guidelines EPA agreed that it would employ technology-based controls such as "best available technology" (BAT) performance standards for existing emission sources, and performance standards reflecting the "best available demonstrated control technology" (BADCT) for new sources.¹⁴ The pretreatment standards EPA undertook to promulgate were to apply to any of the 65 pollutants listed in the Agreement and any other pollutants that proved to be "incompatible" with "publicly owned treatment works" (POTWs).¹⁵ Promulgation of the regulations envisaged by the Agreement was to take place according to a phased schedule running through December 31, 1979 and compliance with the regulations by affected industries was to be achieved by June 30, 1983.¹⁶

¹⁴ In addition to the technology-based program, NRDC insisted on a provision in the agreement requiring EPA to promulgate health-based standards for six highly toxic pollutants. See *Natural Resources Defense Council, Inc. v. Train*, *supra* note 3, 8 ERC at 2128-2129.

¹⁵ Pretreatment standards are similar to BAT effluent limitations, BADCT performance standards, and other controls prescribed by the statute in that they are "technology-based." They differ from these other controls principally in that they regulate "indirect" discharges into sewers leading into municipal treatment plants rather than "direct" discharges into receiving waters. The term "incompatible" was taken from the language of § 307(b), 33 U.S.C. § 1317(b) (1976).

¹⁶ The prescribed schedule for promulgation of regulations divided the 21 industries covered into five groups. Final regulations for the first two groups were to be promulgated by March 31, 1979, for the third group by June 30, 1979, for the fourth group by September 30, 1979, and for the final group by December 31, 1979. See R. Hall, *supra* note 7, at 520.

Adoption of the industry-by-industry, technology-based approach, using statutory authority conferred by various sections of the FWPCA,¹⁷ marked a change in EPA's regulatory strategy. Its previous efforts to control discharge of toxic pollutants had relied on authority conferred by Section 307 of the FWPCA in developing health-based standards on a pollutant-by-pollutant basis.¹⁸ The new strategy offered substantial advantages over the old. First, it allowed EPA to cover far more substances and emission sources than could have been handled under the old approach.¹⁹ Second, it allowed the Agency to develop a single regulatory package which would apply to all of the problem pollutants in the discharge of a particular industry, enabling the industry to predict the entire cost of pollution control.²⁰ Third, the Agency could allow considerations of cost and technology to enter into its decisionmaking and industry was allowed a longer compliance period.²¹ Finally, EPA also expected that the new program would be easier to administer.²²

After the Agreement was adopted by the District Court Congress began a review of the FWPCA and EPA's progress toward implementing its provisions. Committees of both Houses of Congress held hearings at which

¹⁷ The new regulatory program relied on authority conferred by §§ 301, 304, 306, and 307(b) & (c) of the FWPCA, 33 U.S.C. §§ 1311, 1314, 1316, 1317(b) & (c) (1976).

¹⁸ See R. Hall, *supra* note 7, at 516-517.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* Essentially, this new approach required trading off the stringency and timing of the health-based controls (the time limit for compliance with these standards was one year) for the comprehensive coverage of the technology-based approach. See also K. Hall, *The Control of Toxic Pollutants Under the Federal Water Pollutant Control Act Amendments of 1972*, 63 IOWA L. REV. 609, 620-624 (1977).

various difficulties EPA was experiencing under the then existing statutory scheme were discussed and the new regulatory framework and strategy established by the settlement agreement was explored.²³ In testimony before the congressional committees NRDC's representatives emphasized that the Agreement was working well,²⁴ and EPA's spokesman, while acknowledging that the Agency was having trouble meeting the deadlines set by the Agreement, strongly supported the Agreement.²⁵ The outcome of these hearings was the enactment in December 1977 of several amendments to the FWPCA which was renamed the Clean Water Act (CWA).²⁶ We shall discuss the nature and importance of those provisions of the 1977 Amendments that are pertinent to this case later. At this point we simply note that the Companies and NRDC disagree about the effect of the 1977 Amendments on the settlement agreement.²⁷

²³ See generally *Federal Water Pollution Control Act Amendments of 1977: Hearings on Amendments to Pub. L. No. 95-200 before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works*, Serial No. 95-H25, Part 9, 95th Cong., 1st Sess. (1977) (hereinafter "Senate Hearings"); *Implementation of the Federal Water Pollution Control Act: Hearings before the Subcommittee on Investigations and Review of the House Committee on Public Works and Transportation*, 95th Cong., 1st Sess. 95-32 (Comm. Pr. 1977) (hereinafter "House Hearings").

²⁴ See Senate Hearings, *supra* note 23, at 71 (testimony of James T. Banks); House Hearings, *supra* note 23, at 621 (statement of James T. Banks and Edward L. Strohbehn, Jr.).

²⁵ See Senate Hearings, *supra* note 23, at 627-628 (testimony of Thomas C. Jerling, EPA Assistant Administrator for Water and Hazardous Materials).

²⁶ Pub. L. No. 95-217.

²⁷ The Companies contend that the 1977 Amendments "devised a new statutory framework which provided a comprehensive and workable program to control the discharge of toxic pollutants into the nation's waters." Brief for appellants at 17. NRDC, on the other hand, argues that the amendments "merely codified an exist-

Meanwhile, NRDC's monitoring of EPA's implementation of the Agreement's provisions convinced it that the Agency would not meet any of the deadlines for proposing and promulgating regulations.²⁸ Accordingly, on September 26, 1978 NRDC moved for an order to show cause why EPA should not be held in contempt of the District Court's order approving the settlement agreement.²⁹ EPA responded on October 20, 1978 with a motion to amend the Agreement to extend the deadlines for promulgating regulations, to allow the Agency additional discretion to exclude certain pollutants and industry categories from regulation, and to extend the deadline for compliance with the guidelines to June 30, 1984.³⁰ In its accompanying opposition to NRDC's motion EPA explained why it had not been able to meet the original deadlines specified by the Agreement. Also on October 20, 1978 the Companies filed a motion to vacate the settlement agreement, arguing that Congress had intended the 1977 Amendments which produced the CWA to supplant the settlement agreement, that the Agreement was in conflict with the congressional program, and that continuation of the settlement agreement would inevitably involve the court in questions of analytical chemistry.³¹ On October 30, 1978 NRDC served detailed interrogatories and requests for documents on EPA. Thereafter, NRDC and EPA began discussions on a possible settlement of the controversy. On November 28, 1978 EPA officials met with representatives of the Companies to

ing program that EPA had been implementing *under the old statute* for nearly two years." Brief for appellee NRDC at 34 (emphasis in original).

²⁸ See affidavit of James T. Banks in support of NRDC's motion of September 26, 1978, Supplemental Joint Appendix (Supp. App.) 111.

²⁹ See Supp. App. 105.

³⁰ See Supp. App. 122.

³¹ See Supp. App. 127.

announce that a tentative agreement with NRDC had been reached, and to distribute copies of a proposed joint motion to modify the settlement agreement that EPA and NRDC had agreed to. The Companies were given ten days in which to submit written comments on the proposal. NRDC and EPA considered the suggestions made in the Companies' comments and made some changes in the proposed modifications to reflect these suggestions.²³ EPA and NRDC filed their joint motion to modify the settlement agreement on December 15, 1978.²⁴ At the same time they withdrew all their pleadings relating to the motion for a show cause order.²⁴ The Companies, however, declined to withdraw their motion to vacate the settlement agreement. By agreement of the parties the Companies were given until January 5, 1979 to file with the court any response or objections to the proposed modifications. The Companies filed a memorandum opposing the motion to modify the Agreement. In addition to repeating their contention that the Agreement must be vacated because it had been superseded by the 1977 Amendments, the Companies raised two new arguments. First, they argued that the Agreement also must be vacated because each of the four cases which underlie the Agreement had been mooted by the Amendments and must be dismissed. Second, they maintained that the proposed modification would violate public notice and comment requirements of the Administrative Procedure Act (APA), the Clean Water Act, EPA regulations, and an Executive Order, as well as constitutional requirements of due process. The District Court heard oral argument on both motions and permitted additional briefs on the new issues raised by the Companies. On March 9, 1979 the District Court issued its order denying the Com-

²³ The Companies maintain that the comments did not result in any substantive revision of the tentative agreement.

²⁴ See Supp. App. 201-210.

²⁴ See Supp. App. 198, 199.

panies' motion to vacate the settlement agreement and granting NRDC's and EPA's motion to modify the Agreement.

In its memorandum opinion accompanying the order the District Court addressed each of the Companies' arguments. First, it rejected the Companies' claim that Congress intended the 1977 Amendments to the FWPCA to supplant the Agreement. The court concluded that neither the terms of the Amendments nor the legislative history support this claim. Instead, it found that Congress intended the Agreement "to remain in effect to supply the missing details of a cohesive strategy for controlling toxic water pollution." *Natural Resources Defense Council, Inc. v. Costle*, *supra*, 12 ERC at 1836. Second, the court ruled that two of the four cases that were resolved by the settlement agreement were not moot, and that these two cases provided an adequate basis for continuing the Agreement. *Id.* at 1837, 1838. Finally, the court dismissed the Companies' statutory and constitutional objections to the modifications to the settlement agreement proposed by NRDC and EPA. The court found that the modifications were not "rules" within the meaning of the APA for which notice and comment were required, and that appellants' constitutional rights to effective notice were not violated because the modifications would have no direct or immediate effect on them. *Id.* at 1838-1840. These appeals followed.

II.

On appeal the Companies raise essentially the same three arguments that they presented to the District Court. We will examine these arguments separately.

A. *The Effect of the 1977 Amendments*

Appellants contend that the District Court erred in rejecting their claim that Congress intended the 1977 Amendments to supersede the settlement agreement. Ap-

pellants maintain that these Amendments were a direct response to the problems EPA had faced in attempting to implement the provisions of the FWPCA, the same problems that were responsible for the shortcomings in the Agency's fulfillment of its statutory obligations that NRDC's lawsuits were aimed at rectifying. The Companies point out that Congress devoted a significant amount of time to studying these problems.²² The outcome of this detailed review, appellants contend, was a congressional acknowledgement that EPA's failure to accomplish much in terms of realizing the objectives and goals of the FWPCA was largely a result of deficiencies in both substantive and procedural provisions of the Act. Appellants argue that the toxic pollutant provisions of the 1977 Amendments were designed to replace the unworkable provisions of the FWPCA with a comprehensive and workable statutory framework for regulation of toxic pollutants that would eliminate the need for continued court supervision of the toxic pollutants programs. In particular, Congress abandoned the requirement that EPA develop health-based standards regulating discharge of toxic pollutants on a pollutant-by-pollutant basis, substituting in its place an industry-by-industry, technology-based BAT approach to controlling emission sources. In addition, Congress resolved the controversy over how many pollutants should be included in EPA's list of toxic pollutants by specifying 65 pollutants that had to be included in the list and granting EPA's Administrator authority to add pollutants to or delete them from this list. While acknowledging that these two changes merely adopted the regulatory framework established by the settlement agreement, appellants point to other pro-

²² Appellants note that both Houses of Congress held hearings on these problems and the staff of the House Subcommittee on Investigations and Review prepared a report on their investigations into the problems of the toxics programs for the House Committee on Public Works and Transportation. See House Memorandum, 123 Cong. Rec. H12929-H12932 (daily ed. Dec. 15, 1977).

visions in the Amendments which they contend show that Congress did more than merely ratify the settlement agreement.²² In appellants' view, the breadth and detail of these other changes demonstrate that Congress "went beyond mere ratification of the [settlement agree-

²² Specifically, appellants point to the following amendments:

—Section 301(1) specifies that neither the economic capability (301(c)) nor the water quality (301(g)) waiver of effluent limitations is applicable to toxic pollutant limitations;

—Section 307(a) (2) (1) authorizes EPA to establish effluent standards for toxic pollutants which are "more stringent" than the BAT-level effluent guidelines, if the BAT guidelines are not sufficient to protect the public health or the environment; (2) establishes the procedure EPA must follow in establishing the standards; and (3) establishes its own timetable for promulgating such standards;

—Section 307(b) (1) provides that a source discharging into a publicly owned treatment works (POTW) may have the stringency of its effluent limitations reduced to reflect the ability of the POTW to remove some or all of a toxic pollutant provided certain conditions are met;

—Section 311 authorizes EPA to regulate the plant-site runoff, spillage, waste disposal and drainage associated with the use of toxic (section 307(a)) or hazardous (section 311) pollutants;

—Section 307(b) (2) (C) specifies that effluent guidelines for all the toxic pollutants specified by Congress (the list of sixty-five) must be promulgated by EPA not later than July 1, 1980;

—Section 301(b) (2) (C) specifies that discharges must comply with the effluent guidelines promulgated for the pollutants designated by Congress not later than July 1, 1984 * * *;

—Section 307(b) (2) [sic] [§ 301(b) (2) (D)] specifies that for pollutants which EPA adds to the new section 307(a) list, compliance with the toxic pollutant guidelines is required not later than three years after such guidelines are established;

—Section 307(a) provides that the Administrator of EPA may add to or delete pollutants from the section 307(a) list, and that his decision shall be final except upon a judicial determination that it was arbitrary and capricious.

Brief for appellants at 19-20.

ment] and tinkering with its toxics program and instead devised a comprehensive program to control the discharge of toxic pollutants to replace the old section 307(a) and the [Agreement]." ²⁷

Appellants find further support for their view that Congress intended the Amendments to supersede the settlement agreement in the legislative history of the Amendments. In this the Companies largely rely on a statement made by Congressman Roberts while explaining the toxic pollutant provisions of the House-Senate Conference Report to his colleagues. Congressman Roberts said:

In summary, the revisions to the toxics regulatory program contained in the conference report . . . simplify the procedures for identifying toxic pollutants and promulgating regulations according to their characteristics. The discretion exercised by the Administrator is broadened, the procedures less formally structured, and burdens of proof modified to the point where the program may proceed in a more rapid and orderly fashion without further recourse to the courts.

Crisis-by-crisis reaction to the problem of toxics must no longer be the norm, but must be replaced by an orderly program for adding compounds to the list, with the Administrator fully in charge. It, therefore, would be entirely appropriate for the United States to petition the courts to relinquish jurisdiction over toxic pollutant control under Public Law 92-500, now that the statutory basis has been laid for a workable regulatory program the lack whereof led to the litigation resulting in the consent decree. This is particularly appropriate in view of the large number of potentially toxic chemicals to be addressed by the program and the need

²⁷ Brief for appellants at 21.

for administrative discretion within the revised regulatory framework to carry out the provisions of law enacted herein.

This is the intent of this legislation, an outgrowth of House initiatives by the House conferees.

123 Cong. Rec. H12927-H12928 (daily ed. Dec. 15, 1977). Appellants maintain that Congressman Roberts' views must be given significant weight, pointing out that he was chairman of the House Subcommittee that drafted the Amendments, chairman of the House conferees, vice-chairman of the House-Senate Conference Committee, and floor manager of the Conference Report in the House. Appellants suggest that Congressman Roberts' statement takes on added significance because the toxic pollutant provisions of the Amendments were drafted by the Conference Committee and the Conference Report is silent on the issue of congressional intent.²²

Claiming to have demonstrated that Congress intended the 1977 Amendments to supplant the settlement agreement, appellants then note that courts have vacated settlement agreements where an intervening Act of Congress has changed the relevant law in such a manner as to eliminate the right which the settlement agreement was designed to safeguard. The Companies find illustrations of the operation of this principle in two Supreme Court cases, *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), and *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855). In *Wheeling & Belmont Bridge* the Court examined the effect of subsequent legislation on an outstanding injunction. The State of Pennsylvania had earlier obtained an injunction barring the company from constructing or maintain-

²² Appellants note that Senator Muskie, who was the floor manager of the Conference Report in the Senate, was absent from the House-Senate Conference due to illness. See 123 Cong. Rec. S19636 (daily ed. Dec. 15, 1977).

ing a bridge across the Ohio River on the ground that the bridge in question obstructed navigation in such a manner as to be in conflict with certain Acts of Congress regulating navigation. A subsequent statute declared the bridge to be a lawful structure in its existing position and elevation. The Supreme Court dissolved the injunction, pointing out that the later Act of Congress had eliminated the public right the injunction had served to protect by resolving the question whether the bridge was an unlawful obstruction. In *System Federation* the Court relied on *Wheeling & Belmont Bridge* in holding that a District Court had abused its discretion in refusing to modify a consent decree after an Act of Congress changed the relevant law. The District Court had earlier approved a consent decree resolving litigation brought by non-union employees against a railroad and a number of unions representing its employees. The plaintiffs had charged the defendants with violating Section 2 of the Railway Labor Act which forbade discrimination against non-union employees. As part of the settlement agreement the court enjoined the defendants from discriminating against non-union employees because of their refusal to join a union. After Congress amended the Railway Labor Act to permit contracts requiring union shops the unions petitioned the District Court for a modification of the consent decree to permit negotiation of union shop contracts. The District Court denied the petition and the Sixth Circuit affirmed. In reversing the Supreme Court pointed out that "the District Court's authority to adopt the consent decree comes only from the statute which the decree is intended to enforce" since "[i]t was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree." *System Federation No. 91 v. Wright, supra*, 364 U.S. at 651. The Court then noted that a "court must be free to continue to further the objectives of [an] Act when its provisions are amended" by "modify[ing] the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives." *Id.*

The Companies argue that since the terms and legislative history of the 1977 Amendments indicate that Congress intended the toxic pollutant provisions of the Amendments to supersede the framework established by the settlement agreement, application of the settled principles announced by the Supreme Court in *Wheeling & Belmont Bridge* and *System Federation* requires that the judgment of the District Court in the instant case be reversed and the settlement agreement vacated.

The power of a District Court sitting as a court of equity to modify the terms of a settlement agreement it previously adopted cannot be drawn into question. See *System Federation No. 91 v. Wright*, *supra*, 364 U.S. at 642-647; *Chrysler Corp. v. United States*, 316 U.S. 556 (1942); *United States v. Swift & Co.*, 286 U.S. 106 (1932). The decision to grant or deny a request to modify the terms of a consent decree rests with the discretion of the District Court. See *System Federation No. 91 v. Wright*, *supra*, 364 U.S. at 657; *Chrysler Corp. v. United States*, *supra*, 316 U.S. at 562. However, sound exercise of judicial discretion may require that terms of a consent decree be modified when there has been a significant change in the circumstances obtaining at the time the consent decree was entered. This change in circumstances may result from a change in controlling law, including changes brought about by subsequent legislation. See, e.g., *System Federation No. 91 v. Wright*, *supra*; *Pennsylvania v. Wheeling & Belmont Bridge Co.*, *supra*; *Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811, 816 (D.C. Cir. 1974); *McGrath v. Potash*, 199 F.2d 166, 167-168 (D.C. Cir. 1952). Application of these settled principles does not, however, provide a ready answer to the case at bar. One of the issues we must resolve is whether in fact Congress intended the 1977 Amendments to supplant the settlement agreement.

Our starting point, of course, is the language and provisions of the Amendments. Clearly, the strongest evi-

dence of a congressional intent to supersede the settlement agreement would be an explicit declaration of such an intention in the language of the Amendments. In the instant case we do not understand appellants to be suggesting that any such declaration of congressional intent appears in the language of the 1977 Amendments. Nor have we found any such statements. The silence of the Amendments on the issue of Congress' intent with regard to the settlement agreement is not necessarily fatal to appellants' claim, however. As the District Court pointed out,³⁹ if a congressional intent to supplant the Agreement is a "necessary implication" of the provisions of the Amendments, we would have to find that appellants are correct in arguing that the Agreement must be vacated.⁴⁰ Alternatively, evidence of congressional intent may be provided by clear statements in the legislative history.

After reviewing the changes made in the toxic pollutant provisions of the FWPCA by the 1977 Amendments, as well as the legislative history of the Amendments, we are unable to accept appellants' contention that they show that Congress clearly intended the 1977 Amendments to supersede the settlement agreement. First, this case does not present an instance of the type of situation that confronted the Supreme Court in *System Federation* and *Wheeling & Belmont Bridge*—a situation in which there is a clear conflict between the terms of a settlement agreement and the provisions of a subsequent Act of Congress. As appellants concede,⁴¹ the two major substantive changes in the toxic pollutant provisions of

³⁹ *Natural Resources Defense Council, Inc. v. Costle*, 12 ERC 1833, 1836 (D.D.C. 1979).

⁴⁰ Thus in *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), the absence of an explicit declaration of congressional intent to affect the terms of the injunction at issue in that case did not prevent the Supreme Court from concluding that the District Court should have amended its outstanding decree.

⁴¹ See brief for appellants at 18.

the FWPCA that were made by the 1977 Amendments merely ratified the settlement agreement. Both Congress' substitution of an industry-by-industry, technology-based BAT approach for the pollutant-by-pollutant, health-based approach required by Section 307 of the FWPCA, and its decision to specify a list of 65 pollutants—the same pollutants listed in the Agreement—that were to be included in EPA's revised list of toxic pollutants under Section 307(a), amounted to little more than an "attempt to conform the statute to the reality of [the] program" EPA had been developing under the terms of the settlement agreement. *National Resources Defense Council, Inc. v. Costle*, *supra*, 12 ERC at 1836. See *Hercules, Inc. v. EPA*, 598 F.2d 91, 101 (D.C. Cir. 1978).

Only in two relatively minor aspects did the amended statute depart from the framework established by the settlement agreement. First, Section 307(a) of the Act was amended to allow EPA's Administrator to add to or delete from the list of 65 toxic pollutants. Second, the Agreement's deadline for promulgation of BAT regulations was extended to July 1, 1980.⁴² These minor departures from the terms of the settlement agreement cannot be interpreted as evidence of a congressional rejection of the Agreement, or as signs of an intention to supersede all its provisions. If instead of endorsing the strategy and framework set out in the settlement agreement the Amendments had required EPA to adopt a different regulatory approach, we might be inclined to agree with the Companies that a congressional intention to supersede the Agreement is a "necessary implication." But as we have already indicated, this is not such a case. Indeed, if any inferences are to be drawn from Congress' actions, it would appear that the District Court's conclusion that "Congress intended for the Agreement to

⁴² The District Court modified the settlement agreement to conform to the new deadline for promulgating BAT regulations established by Congress.

remain in effect to supply the missing details of a cohesive strategy for controlling toxic water pollution"⁴³ is the more plausible inference.

We are also not persuaded by the Companies' claim that the legislative history of the Amendments offers clear evidence of a congressional intent to supplant the settlement agreement. First, we, like the District Court, have some difficulty understanding why if, as appellants maintain, Congress wanted to supplant the Agreement, it did not bother to say so in any of the reports—House, Senate, or Conference—that accompanied the legislation; this in spite of the fact that it also failed to express this intent in the Amendments themselves. The absence of any indications of such congressional intent in the various reports could not have been inadvertent since both House and Senate Committees heard testimony from NRDC and EPA about the terms of the settlement agreement.⁴⁴ Moreover, the silence of the committee reports on this issue of congressional intent stands in marked contrast to the clarity with which these reports dealt with other court decisions which Congress chose to supersede. For example, in amending Sections 313 and 404 of the FWPCA to make it clear that the dredging activities of the Army Corps of Engineers are subject to state water quality laws, the Senate Report explained that these amendments were intended to overrule a contrary holding by the Eighth Circuit in *Minnesota v. Hoffman*, 543 F.2d 1198 (8th Cir. 1976), *cert. denied*, 430 U.S. 977 (1977). S. Rep. No. 95-370, 95th Cong., 1st Sess. 68 (1977).⁴⁵

⁴³ *Natural Resources Defense Council, Inc. v. Costle*, *supra* note 39, 12 ERC at 1836.

⁴⁴ See notes 24 and 25 *supra*.

⁴⁵ Similarly, in discussing a new provision dealing with compliance orders under § 309 the Senate Report noted:

Under existing law there are no circumstances that justify a time for compliance extending beyond July 1, 1977. The Ad-

The only real support for their interpretation of congressional intent the Companies have pointed to is the statement by Congressman Roberts quoted above.⁴⁶ It is, of course, well established that courts give considerable weight to the views of sponsors and floor managers of legislation in determining congressional intent. See *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66-67 (1924); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 374, 394-395 (1954); *United States v. United Mine Workers of America*, 330 U.S. 258, 278-284 (1947). However, not even Congressman Roberts' statement offers such clear support for appellants' claim. Congressman Roberts did not suggest that it was Congress' intention (as he understood it) that the 1977 Amendments would automatically supersede the Agreement. Rather, he merely indicated that inasmuch as Congress had amended the procedural provisions of the FWPCA that were responsible for EPA's difficulties with implementing the statute, EPA should consider "petition[ing] the courts to relinquish jurisdiction over toxic pollutant control * * *."⁴⁷ Thus the most that appellants can claim is that Congressman Roberts thought it "entirely appropriate" for EPA to ask the court to relinquish jurisdiction. This is not quite the same as a suggestion that Congressman Roberts believed that the Amendments would automatically supersede the settlement agreement.

ministrator can only issue an enforcement order requiring compliance within 30 days or initiate civil or criminal action. Thus, the decision of the U.S. Court of Appeals for the Sixth Circuit in *Republic Steel Corporation v. Train et al.* and *Williams*, — F.2d —, (6th Cir. 1977) was an incorrect interpretation of existing law.

S. Rep. No. 95-370, 95th Cong., 1st Sess. 60 (1977).

⁴⁶ See — F.2d at — (pp. 16-17) *supra*.

⁴⁷ 123 Cong. Rec. H12927-H12928 (daily ed. Dec. 15, 1977) (remarks of Representative Roberts).

Moreover, there are other statements in the legislative history of the Amendments, including a statement by Congressman Roberts, which indicate a different view of congressional intent from that suggested by appellants. The Senate Report on the 1977 Amendments had this to say about the regulatory framework established by the settlement agreement:

During the course of its hearings the committee examined in detail EPA's proposal and strategy for controlling the discharge of toxic pollutants primarily through the development of effluent guidelines for the best available technology economically achievable under section 301(b)(2)(A) and the subsequent reissuance of permits under section 402 to require the application of such technology by dischargers by July 1, 1983. *The Committee approves of and endorses this strategy.*

S. Rep. No. 95-370, *supra*, at 56 (emphasis added). Similarly, in explaining the reasoning behind the toxic pollutant provisions of the Conference Report to his Senate colleagues Senator Muskie noted:

Another, and possibly more important, reason for maintaining the BAT requirements is that the Agency currently has a major program underway of using BAT to control toxics. Technology-based effluent limitations are being developed which will place limits on toxic pollutants which pose or are likely to pose human health and ecological hazards.

The conference agreement was specifically designed to codify the so-called "Flannery decision," which set forth 65 families of pollutants which are to be regulated by BAT, and EPA has been implementing this consent decree. To take a different course for dealing with toxics at this point would require a major reprogramming of EPA resources. Such a delay, whether it be to allow utilization of a

different section of the act or in order to implement this section, would only cause confusion and add still more delay to efforts to solve the toxics problem. The discharge of toxic pollutants should be eliminated as soon as possible. Because EPA is already embarked upon a program to control toxics using a proven mechanism, technology-based effluent limitations, and because of the urgency to control toxics, prudent public policy demands that the strategy be maintained.

123 Cong. Rec. S19647-S19648 (daily ed. Dec. 15, 1977) (emphasis added). Inasmuch as Senator Muskie was chairman of the Senate Subcommittee which reviewed EPA's implementation of the FWPCA, was a member of the House-Senate Conference Committee on the 1977 Amendments, and served as floor manager of the Conference Report in the Senate, his views are entitled to significant weight in fathoming congressional intent.⁴⁸ Nothing in Senator Muskie's statement suggests that he viewed the settlement agreement as being superseded by the Amendments. If anything, his statement seems to confirm the District Court's conclusion that Congress intended the settlement agreement to supply the details of the toxics program. Further evidence that Congress intended the settlement agreement to continue in force, subject to modifications to conform it to the amended statute, is provided by a statement made by Senator Randolph in discussing the toxic pollutant provisions of the Conference Report. He stated:

In the requirements for the control of toxic pollutants adopted by the conferees, the measure before us largely follows the strategy presently being used

⁴⁸ Although it is true, as appellants point out, *see* note 38 *supra*, that Senator Muskie was prevented from attending the conference by ill health, in his remarks to the Senate Senator Muskie stated that he "undertook to follow the developments in the conference." 123 Cong. Rec. S19636 (daily ed. Dec. 15, 1977).

by the Environmental Protection Agency under the settlement agreement in the case of Natural Resources Defense Council against Train. That important case required the development of a minimum degree of control for a specified list of pollutants to be achieved on a definite schedule. *The principal way in which the conference report modifies the settlement agreement is to require the publication of effluent limitations based on best available technology at a minimum for the listed pollutants by July 1, 1980, and to specify July 1, 1984, as the latest date for compliance with those effluent limitations.*

123 Cong. Rec. S19663 (daily ed. Dec. 15, 1977) (emphasis added). Senator Randolph was chairman of the Senate Committee that drafted the 1977 Amendments and a member of the House-Senate Conference Committee. Insofar as Senator Randolph viewed the 1977 Amendments as "modifying" the settlement agreement, it is difficult to believe that he understood Congress' intention to be that the Agreement would be completely superseded by the Amendments. *

Finally, as we have already indicated, a statement by Congressman Roberts suggests that he too assumed that EPA would continue to be bound by the terms of the Agreement. In describing the BAT-toxic pollutants provisions of the Conference Report to the House, Congressman Roberts said the following about the statutory provision authorizing EPA to add to or delete from the list of 65 toxic pollutants specified by the statute:

[T]he Administrator, in his discretion, may determine that certain toxic pollutants—or subclasses of pollutants—are not appropriate for regulation in certain circumstances. For example, the Administrator may use his discretion when equal or more effective protection is already provided with respect to that pollutant by an effluent limitation and guide-

line promulgated pursuant to other sections of the act or, when the discharge of [a] specific pollutant results from its presence in intake water; or, where a specific pollutant is present in either insignificant or trace quantities and does not cause or is not likely to cause toxic effects to identifiable organisms affected by the discharge.

123 Cong. Rec. H12927 (daily ed. Dec. 15, 1977).⁴⁹ However, Congressman Roberts did not describe decision-making criteria contained in the statute. Rather, these decisionmaking criteria are contained in paragraph 8 of the settlement agreement. Section 307(a)(1) merely directs the Administrator to "take into account toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and the extent of the effect of the toxic pollutant on such organisms."⁵⁰ Thus Congressman Roberts' statement seems to imply that he too expected that the settlement agreement would continue in force to supply missing details for the toxic pollutants program.⁵¹

These indications in the legislative history of the 1977 Amendments that Congress expected the settlement agreement to continue in effect, and the ambiguity of such evidence as the Companies are able to marshal in support of their interpretation of congressional intent, lead us to conclude that the District Court properly rejected appellants' statutory supersession argument. We therefore turn to the Companies' claim that the Agreement should

⁴⁹ Senator Randolph described these same factors in explaining the decisionmaking criteria to be used by EPA's Administrator in making listing decisions. See 123 Cong. Rec. S19663 (daily ed. Dec. 15, 1977) (remarks of Senator Randolph).

⁵⁰ 33 U.S.C. § 1317(a)(1) (Supp. II 1978).

⁵¹ See K. Hall, *supra* note 22, at 622 n.80.

be vacated because each of the four cases which provided the basis for the Agreement is now moot and must be dismissed.

B. Mootness

Appellants begin their discussion by pointing out that Article III's "case or controversy" requirement prevents federal courts from issuing judgments in cases which are moot. Citing Supreme Court decisions in *Hall v. Beals*, 396 U.S. 45 (1969), and *Kremens v. Bartley*, 431 U.S. 119 (1977), appellants further note that a case may become moot if the statute upon which a claim is based is amended in such a fashion that the facts set forth in the complaint do not present a controversy under the new law. Appellants contend that application of these controlling legal precedents to the facts of the instant cases requires vacation of the settlement agreement and dismissal of the four cases which underlie the Agreement. The Companies suggest that both parties agree (and the District Court found) that two of the four cases are moot. In these two cases—the deadline cases—NRDC had alleged that EPA had violated Section 307(a) of the FWPCA by failing to promulgate final toxic pollutant effluent standards for nine substances within six months of issuing proposed standards as required by the statute. The complaint requested the court to order EPA to promulgate final standards for the nine substances. The Companies note that the 1977 Amendments repealed both the six-month deadline and the requirement that EPA promulgate toxic pollutant effluent standards, replacing these provisions with a requirement that EPA promulgate effluent guidelines for 65 specified pollutants on an industry-by-industry basis by July 1, 1980 and thereby mooting the deadline cases. Appellants contend that the mootness question in these cases involves the two remaining cases—the toxic criteria case and the pretreatment case.

In the toxic criteria case NRDC alleged that EPA had violated the statute in two respects. First, NRDC contended that EPA had used unlawful and restrictive criteria for selecting substances to include in the list of toxic pollutants required by Section 307(a) of the FWPCA. Second, NRDC alleged that because of its use of these impermissible criteria EPA had illegally omitted from the list 25 substances which the Agency would have determined to be toxic pollutants had it used the proper statutory criteria. In the pretreatment case NRDC sought to compel EPA to promulgate pretreatment standards covering over 30 categories of point sources. NRDC alleged that EPA had violated the statute by failing to publish final pretreatment standards for approximately 31 categories of point sources within 90 days of publishing proposed standards as required by the Act, and it noted that proposed standards for 14 of these categories had been pending for more than one year.

Appellants argue that NRDC's claim in the toxic criteria case was based on language in the old Section 307 which was repealed by the 1977 Amendments, noting that the new Section 307(a) only requires EPA to publish a list of 65 specified toxic pollutants, which EPA has done, and further provides that EPA "may revise [this] list" by adding pollutants to or deleting them from it. Appellants maintain that the 1973 EPA decisions at issue in the toxic criteria case are irrelevant to the Agency's implementation of the new statutory provisions. Appellants further argue that resolution of the issues raised in the toxic criteria case would amount to the court's rendering an advisory opinion because the decision would not alter either the existing Section 307(a) list or the manner in which EPA has and will implement the new statutory provisions. The Companies then turn to the District Court's finding that the toxic criteria case is not moot because "[t]o date, EPA has not renounced the alleged arbitrary and unauthorized criteria it used [to compile

the list of toxic pollutants under the old Section 307(a) in 1973], nor has it published revised selection criteria." *Natural Resources Defense Council, Inc. v. Costle, supra*, 12 ERC at 1837.⁵² The Companies maintain that the District Court failed to realize that the 1973 criteria have been effectively repealed by EPA and have been made irrelevant by the 1977 Amendments.⁵³ The Companies add that when EPA published the list of toxic pollutants in January 1978 as directed by the 1977 Amendments, it omitted any mention of the 1973 criteria in discussing its authority to revise the Section 307 list. Finally, the Companies suggest that events transpiring after the District Court's decision demonstrate that the 1973 criteria are irrelevant and will no longer be applied by EPA. Appellants first note that on March 27, 1979 EPA published a document entitled "Guidance on Factors to be Addressed in Petitions to Revise" the Section 307(a)

⁵² The District Court further noted:

Even if EPA were to renounce its selection criteria, the [toxic criteria] case would not be moot if the court were to determine that there was a sufficient threat of repetition of the allegedly illegal action by the agency. See, e.g., *United States v. Concentrated Phosphate Export Association, Inc.*, 393 U.S. 199, 208 (1968).

Natural Resources Defense Council, Inc. v. Costle, supra note 89, 12 ERC at 1837 n.5.

⁵³ The Companies note, for example, that under the old § 307 EPA was required to promulgate effluent standards for pollutants on the § 307 list within one year of the date the pollutant was placed on the list. Appellants argue that this deadline precluded the Agency from undertaking any new scientific research about a pollutant and forced EPA to rely on whatever scientific data was available at the time the pollutant was listed, which in turn became one of the 1973 criteria. The Companies contend that insofar as the 1977 Amendments eliminated the one-year time limit, EPA no longer has any reason to consider whether under the 1973 criteria adequate data are available to set standards for a particular pollutant.

toxic pollutant list. 44 Fed. Reg. 18279 (March 27, 1979). Appellants maintain that the list of factors contained in this document effectively repealed the 1973 criteria. Second, appellants maintain that in denying two petitions by Dow Chemical Company to remove two substances from the Section 307 list the Agency made no mention of the 1973 criteria, thereby confirming that the March 27, 1979 publication effectively repealed the 1973 criteria.

The Companies' contention that the fourth case—the pretreatment case—is moot is based on their interpretation of the provisions of the settlement agreement. They contend that to settle the pretreatment case EPA and NRDC agreed to paragraph 13 of the settlement agreement pursuant to which EPA undertook to promulgate pretreatment standards covering eight industry categories by May 15, 1977. Appellants point out that EPA has issued regulations establishing pretreatment standards for the eight industrial categories listed in paragraph 13, and they argue that EPA's fulfillment of its obligations has extinguished the controversy between the parties and rendered the pretreatment case moot.

Finally, appellants contend that even if the District Court was correct in finding that the pretreatment and toxic criteria cases are not moot, it still erred by refusing to vacate the Agreement. According to the Companies, the proper procedure to be followed when a court discovers that some of the cases which underlie a settlement agreement have become moot is to vacate the agreement and rehear the remaining cases to determine what, if any, relief is appropriate in light of the issues which remain live controversies. Appellants maintain that this procedure is necessary to avoid adjudication of moot issues, and is mandated by constitutional limitations on the court's power as well as by the Supreme Court's decision in *Duke Power Co. v. Greenwood County*, 299 U.S. 259 (1936). In that case an action was brought by a

utility to restrain the County from constructing a power plant and from making contracts for that purpose. The Federal Emergency Administrator for Public Works intervened in the case, revealing that the federal government had entered into a contract with the County to loan it money for the project. The utility challenged the constitutionality of the loan and was upheld by the District Court which entered a final decree enjoining the contract. While the appeal was pending the County and the Administrator terminated the first contract and substituted a new contract which they claimed did not contain the objectionable provisions of the old one. The Court of Appeals remanded the case to the District Court for reconsideration in light of the new contract. Although the pleadings in the District Court were not amended and the court's term had expired, the District Court nevertheless heard evidence regarding the new contract.

On appeal the Supreme Court ruled that the first decree should have been vacated so as to revest the court with jurisdiction over the case. The Court pointed out that "[w]here it appears upon appeal that [a] controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss. * * * If it appears that supervening facts require a retrial in the light of a changed situation, the appropriate action of the appellate court is to vacate the decree which has been entered and revest the court below with jurisdiction of the cause to the end that the issues may be properly framed and the retrial had." *Id.* at 267-268 (citations omitted).

Appellants contend that *Duke Power* requires a trial court to vacate a settlement agreement to the extent that it is based on mooted issues, arguing that the court has no power to modify such an agreement without making a preliminary determination that the issues, if any, in the remaining "live" controversies will support the

modified decree. Appellants claim that the District Court refused to make such a determination in this case.⁵⁴ The Companies further argue that as a factual matter the pretreatment and toxic criteria cases do not provide an adequate basis for continuing the settlement agreement. In their view, the remaining controversies in these two cases, assuming that there are some, cannot support even the original settlement agreement, let alone the modifications approved by the District Court.⁵⁵

Addressing first the Companies' claim that both the pretreatment and toxic criteria cases are moot, we agree with the District Court that these two cases remain live controversies. With respect to the pretreatment case, we

⁵⁴ In support of this claim the Companies quote the District Court's statement that:

Because it was the settlement as a whole that represented an acceptable bargain to both sides, it cannot be said that each portion of the Agreement is specifically responsive to a particular claim contained in one or more of the original complaints. *It would do violence to the settlement* for the court to attempt to separate aspects of the Agreement that rest on the arguably moot causes of action from those that do not.

Natural Resources Defense Council, Inc. v. Costle, supra note 39, 12 ERC at 1838 (appellants' emphasis).

⁵⁵ NRDC argues that the mootness doctrine does not apply to this case, maintaining that congressional action eliminating the case or controversy between the parties can only moot inchoate liabilities. It contends that once the liability has matured and has been reduced to judgment a court's original jurisdiction continues for purposes of enforcing the liability, even where the defendant needs a substantial amount of time to meet its obligations. According to NRDC, the proper analysis in cases such as this is to ascertain whether Congress intended to affect pre-existing liabilities, which it must do expressly or by necessary implication from the amending legislation. Applying this reasoning to the instant case, NRDC argues that Congress did not intend to deprive NRDC of its remedy contained in the Agreement or its right to enforce that remedy. Because we agree with the District Court that the pretreatment and toxic criteria cases are not moot, we have no need to examine NRDC's mootness argument.

are unable to agree with the Companies' suggestion that EPA's compliance with the requirements of paragraph 13 of the settlement agreement has fulfilled all its obligations relating to that case and therefore eliminated the controversy between NRDC and EPA. NRDC's complaint in the pretreatment case alleged violations and requested relief pertaining to "all pollutants which are determined not to be susceptible to treatment by [publicly owned treatment works] or which would interfere with the operation of such works."⁵⁶ In addition, the complaint specifically listed over 30 categories of point sources for which EPA was required to promulgate pretreatment standards.⁵⁷ Paragraph 13 of the settlement agreement, on the other hand, merely required EPA to promulgate pretreatment standards covering eight industries.⁵⁸ Given the very broad scope of relief requested by NRDC's complaint in the pretreatment case and the relatively narrow reach of paragraph 13, it is difficult to accept the Companies' claim that NRDC exchanged its pretreatment case for the provisions in paragraph 13. Moreover, the Companies' suggestion that this is the deal that was struck is unsupported by any evidence other than appellants' bald allegation that this is what happened. As the District Court pointed out,⁵⁹ other paragraphs of the settle-

⁵⁶ See Supp. App. 91.

⁵⁷ See Supp. App. 85-86.

⁵⁸ NRDC points out that the timetable for promulgating pretreatment standards for the eight industries listed in paragraph 13 was shorter than the timetable that applied to other industries for which pretreatment standards were to be developed. NRDC explains that this expedited schedule was included because the eight industries included a large number of indirect dischargers, see brief for appellee NRDC at 57 n.33, and because these were the only industries for which EPA could promulgate standards within 12 months. *Id.* See also R. Hall, *supra* note 7, at 522.

⁵⁹ *Natural Resources Defense Council, Inc. v. Costle*, *supra* note 39, 12 ERC at 1838.

ment agreement outline other actions relating to pretreatment standards that EPA agreed to undertake and which it has not yet done.⁶⁰ Thus even if we were to accept the Companies' implicit assumption that only those provisions in the Agreement which deal with pretreatment standards were exchanged for NRDC's agreement not to prosecute the pretreatment case, we would still reject the suggestion that the case is moot. Finally, inasmuch as the settlement agreement was "a comprehensive interrelated package,"⁶¹ it is reasonable to assume that other provisions of the Agreement, such as the BAT limitations and guidelines, were also part of the *quid pro quo* NRDC received in return for agreeing not to litigate the pretreatment case.

As for the toxic criteria case, it should first be noted that appellants are simply wrong in suggesting that NRDC's claim in that case was based on language in the FWPCA which was repealed by the 1977 Amendments. In fact the disagreement between NRDC and EPA revolved around the latter's interpretation of the statutory criteria for making listing decisions. The 1977 Amendments did not change these criteria in any way. While appellants may be correct in suggesting that the Amendments changed what may have been the Administrator's mandatory duty to list pollutants into a discretionary duty by explicitly leaving the decision to add to, or delete from, the list specified by Congress to his discretion, the nature of the Administrator's duty was not central to the controversy between NRDC and EPA. In making the now discretionary listing decisions the Administrator must still use the proper statutory decision-making criteria. If in fact the EPA has continued to use

⁶⁰ See paragraphs 3, 4, and 7 of the settlement agreement. *Natural Resources Defense Council, Inc. v. Train*, *supra* note 3, 8 ERC at 2124-2126.

⁶¹ *Natural Resources Defense Council, Inc. v. Costle*, *supra* note 39, 12 ERC at 1838.

the 1973 criteria (which NRDC alleges violate the statute), or at the very least has not renounced these criteria, we can hardly conclude that the toxic criteria case is moot. Thus appellants' contention that the case is moot must ultimately rest on their claim that EPA has abandoned the 1973 criteria.

We agree with the District Court that there is no clear evidence indicating that EPA has abandoned the 1973 criteria. Even the EPA publications on which the Companies rely in arguing that EPA has abandoned the 1973 criteria demonstrate that this claim is inaccurate. As NRDC points out, one of the factors listed in these EPA publications as having been considered by the Agency is a pollutant's usual or potential presence in water,⁶² a factor which, NRDC maintains, the statute does not permit the Agency to consider and one of the allegedly illegal criteria mentioned in NRDC's complaint in the toxic criteria case.⁶³ We therefore conclude that the District Court correctly found that the toxic criteria case is not moot because there is no clear indication that EPA has abandoned the 1973 criteria.

Having determined that the toxic criteria and pretreatment cases are not moot, it remains for us to consider

⁶² For example, this was one of the factors EPA considered in denying petitions by Dow Chemical Company to remove certain pollutants from the § 307(a) list. See 44 Fed. Reg. 18282 (Mar. 27, 1979); 44 Fed. Reg. 34691 (June 15, 1979). Moreover, EPA's March 27, 1979 list of factors to be considered by the Agency also mentions the extent of point source discharges of the pollutant into water and the annual production and "use patterns" of the pollutants in the United States. 44 Fed. Reg. 18279 (Mar. 27, 1979). NRDC contends that the statute only permits EPA to consider the usual and potential presence of the *affected* organisms in water. Brief for appellee NRDC at 53. Of course we do not need to resolve the disagreement between EPA and NRDC about what factors may properly be considered by the Agency in making listing decisions. All we need do is acknowledge the existence of this controversy which indicates that the toxic criteria case is not moot.

⁶³ See Deferred Joint Appendix (Def. App.) at 20.

appellants' contention that the proper procedure for the District Court to follow in these circumstances was to vacate the settlement agreement and rehear the two remaining cases. Appellants have not pointed to any cases that have addressed this precise issue of the procedure to follow when some of the cases underlying a settlement become moot. However, courts have on numerous occasions dealt with the question whether a change in circumstances which moots some of the issues in a particular case thereby eliminates the court's jurisdiction over the entire case. The usual practice in such situations is for the court to determine whether any remaining controversies in the case provide an adequate basis for continued jurisdiction. An illustration of this is the Supreme Court's decision in *Powell v. McCormack*, 395 U.S. 486 (1969). There, Representative Powell had been denied his seat in the House by the 90th Congress, but by the time the case was heard in the Supreme Court he had been reelected and seated by the 91st Congress. Without determining whether his claims for more specific relief had become moot, the Court ruled that his claim for damages on account of past salary required disposition of the merits of the case. The Court pointed out that "[w]here one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." *Id.* at 497.⁶⁴

This disposition of partially moot cases suggests that even under appellants' mootness theory a court continues to have jurisdiction over a settlement agreement where some of the cases that underlie the agreement remain live controversies. Thus the District Court had jurisdiction over the Agreement because the pretreatment and toxic criteria cases had not become moot. While it may

⁶⁴ See also, e.g., *Liner v. Jafco*, 375 U.S. 301 (1964); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *Petersen v. Talisman Sugar Corp.*, 478 F.2d 73 (5th Cir. 1973).

become necessary to modify the terms of a settlement agreement because some of the cases which provided the basis for it have become moot, we do not agree with appellants' suggestion that the court *must* first vacate the settlement agreement and rehear the remaining live cases. Nothing in *System Federation No. 91 v. Wright, supra*, suggests that this is the required procedure.⁶⁵ And as we have previously indicated, the decision whether to modify a settlement agreement in light of changed circumstances is ordinarily left to the discretion of the District Court. As the Supreme Court noted in *System Federation No. 91 v. Wright, supra*, "A balance must * * * be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances. Where there is such a balance of imponderables there must be wide discretion in the District Court." 324 U.S. at 647-648. We are of the view that the procedure to follow in circumstances such as those presented by this case is also best left to the discretion of the District Court. Where it deems it appropriate the court may choose to vacate the settlement and rehear the remaining live controversies. Alternatively, the court may simply decide whether modification of the agreement is necessary or appropriate.

Nothing in the Supreme Court's decision in the *Duke Power* case suggests a different rule. *Duke Power* involved a situation in which the action of the defendants in terminating the contract that had been at issue in the first proceeding before the District Court completely

⁶⁵ In a sense Congress' action in amending the Railway Labor Act to permit union shops mooted the controversy between the employees and the railroad and the unions over whether the employees could be discriminated against because of their failure to join a union. The Supreme Court simply ruled in *System Federation* that the District Court should have amended the consent decree to reflect this change. The Court did not suggest that the proper procedure for the court to follow in deciding this issue was to first vacate the consent decree and then rehear the remaining controversies.

eliminated the controversy in that case. As such the court no longer had jurisdiction over the case. In order to vest the court with jurisdiction over the new controversy created by the existence of the new contract executed by the County and the federal government, the District Court's decree in the first case had to be vacated and the parties allowed to amend their pleadings in light of the new factual and legal issues that were raised by the second contract. *Duke Power* has been uniformly interpreted as indicating the procedure to be followed by an appellate court asked to review a decision which has been mooted by events that transpired after the lower court's decision was rendered. See, e.g., *United States v. Munisingwear*, 340 U.S. 36, 39-40 (1950); *Giumarra Vineyards Corp. v. Farrell*, 431 F.2d 923, 925 (9th Cir. 1970); *Knapp v. Baker*, 509 F.2d 922 (5th Cir. 1975); *Narrangansett Improvement Co. v. Local Union No. 251*, 506 F.2d 715 (1st Cir. 1974); *Welch v. Simon*, 498 F.2d 1060, 1062 (D.C. Cir. 1974). As the Supreme Court explained, "Where it appears upon appeal that [a] controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss." *Duke Power Co. v. Greenwood County*, *supra*, 299 U.S. at 267. Thus *Duke Power* does not purport to prescribe a rule to govern situations such as the one in the instant case.

All we need to decide in this case, then, is whether the District Court abused its discretion by refusing to follow the procedure suggested by the Companies. As a preliminary matter, it should be noted that the Companies do not appear to have urged this procedure on the District Court with as much vigor as they press it on appeal.⁶⁶ In these circumstances it is hardly surprising that the

⁶⁶ Apparently, the first time the Companies raised this issue was in a Post-Hearing Brief filed on January 18, 1979, and this issue was only mentioned in a footnote in the brief. See brief for appellants at 44-45 n.50.

court declined to follow this procedure. Be that as it may, the District Court noted that the "Agreement represents a comprehensive, interrelated package of concessions made by EPA in return for plaintiffs' agreement not to pursue the claims raised in the four lawsuits." *Natural Resources Defense Council, Inc. v. Costle, supra*, 12 ERC at 1838. It further noted that "it cannot be said that each portion of the Agreement is specifically responsive to a particular claim contained in one or more of the original complaints." *Id.* Finally, the court pointed out that "the [Companies] nowhere have suggested that the two causes of action as to which controversies still survive would not alone have provided a substantial basis for the settlement approved by the court in 1976." *Id.*⁶⁷ Plainly, the District Court found that these cases do in fact provide an adequate basis for continuing the Agreement. In these circumstances we do not believe that the court abused its discretion by refusing to follow the procedure suggested by the Companies. The court's conclusion that the two non-moot cases provided an adequate basis for continuing the Agreement obviated any need to vacate the Agreement and rehear the cases.

Nor do we think that the District Court was required to make a further determination that the toxic criteria and pretreatment cases could provide an adequate basis for the modifications to the settlement agreement that it approved. Even assuming that the Companies are correct in claiming that the modified settlement agreement "places substantial new burdens and obligations * * *

⁶⁷ The Companies contend that this suggestion by the District Court ignored the footnote referred to in note 66 *supra*, in which they had argued that the proper procedure for the District Court to follow if it were to conclude that the pretreatment and toxic criteria cases were not moot was to vacate the Agreement and rehear these two cases. However, this argument about the proper procedure to follow is not quite the same as a showing that the settlement agreement could not be supported by the remaining live controversies.

upon EPA,"⁶⁸ a claim we will examine in due course, we do not agree that the District Court had to find that these "new burdens" could be supported by the two non-moot cases. The modifications to the settlement agreement were designed to resolve a new controversy that had arisen over EPA's non-compliance with the court's 1976 order approving the Agreement. There can be no question that the District Court had the power to enforce the provisions of a settlement agreement it had approved by requiring further action from the offending party.

C. *Modifications to the Settlement Agreement*

In contending that EPA contravened public notice and comment requirements of the APA, the Clean Water Act, EPA regulations, an Executive Order, and due process rights guaranteed by the Fifth Amendment in proposing the modifications to the settlement agreement, the Companies focus on two changes made by the modifications. The first is a new paragraph 4(c) which modifies paragraph 4 of the original settlement agreement. Paragraph 4 had required EPA to develop pretreatment standards for any of the 65 pollutants listed in the Agreement which are not susceptible to treatment by, or are otherwise incompatible with, publicly owned treatment works. In addition, EPA was required to promulgate, by December 31, 1979, pretreatment standards for all other incompatible pollutants present in the emissions from any of the 21 industries covered by the Agreement.⁶⁹ New paragraph 4(c) requires EPA to initiate a program "to identify and study" pollutants (other than the 65 explicitly covered by the Agreement) which are incompatible with POTWs, and it specifies certain in-

⁶⁸ Brief for appellants at 47.

⁶⁹ *Natural Resources Defense Council, Inc. v. Train*, *supra* note 3, 8 ERC at 2124.

vestigatory steps that the Agency is to follow.⁷⁰ Second, the Companies focus on the modifications to paragraph 12 of the 1976 Agreement. That provision had required

⁷⁰ Paragraph 4(c) provides that:

The Administrator shall establish and implement a program to identify and study other pollutants which are introduced into such treatment works and which are not susceptible to treatment by such works or which interfere with, pass through, or are otherwise incompatible with such works. The program shall, at a minimum, address those pollutants listed in Appendix C identifiable by computer-based mass spectra search programs ("computer matching"), and shall consist of steps to: tentatively identify by computer matching pollutants discharged by point source categories listed in Appendix B; determine frequencies of occurrence and order-of-magnitude concentrations for the tentatively identified pollutants; analytically confirm the computer identification of those pollutants found with significant frequency in at least one subcategory and in high concentrations (the term "high" to be based on comparison with the concentrations of other pollutants found or known to be in the discharge and, where possible, on readily available information with respect to toxicity of the pollutants); determine for those pollutants analytically confirmed, based upon a comprehensive literature search of the latest scientific knowledge, the kind and extent of all identifiable effects on aquatic organisms and human health; develop from the above information a list of pollutants that are candidates for national regulation; determine, by molecular structure analysis and/or laboratory test data and/or field studies, or other appropriate means where practicable, both the probable compatibility of the listed pollutants with treatment works (as defined in Section 212 of the Act) which are publicly owned, and the probable extent to which industrial technology designed to remove pollutants included in Appendix A also will remove listed pollutants. The Administrator may remove pollutants from said pollutant candidate list that he deems to be compatible with publicly owned treatment works or effectively controlled by industrial technology upon which pretreatment standards promulgated pursuant to § 307(b) of the Act are based, or are present in only trace amounts and are neither causing nor likely to cause toxic effects. The Agency shall complete this program by July 1, 1983. Immediately thereafter, the Administrator shall undertake regulatory action for those pollutants remaining on the list.

EPA to set up an investigatory program to determine when and if effluent limitations more stringent than the technology-based limitations mandated by the Agreement are necessary to protect human health or aquatic life.⁷¹ EPA agreed to establish "a specific and substantial program"⁷² for this purpose by June 30, 1978, and to develop such more stringent limitations whenever the Administrator determined that they were necessary.⁷³ The modifications to paragraph 12 specify that this program should include processes for identifying seriously contaminated navigable waters and pollutants for which more stringent limitations are necessary, and a process for developing the necessary strategies for limiting discharge of these toxic pollutants.⁷⁴ The modifications also set deadlines for EPA to develop and announce these strategies.⁷⁵

The Companies and EPA disagree in their characterization of the changes made by these modifications. EPA argues that they provide some fine-tuning of the Agreement, incorporating lessons the Agency has learned in over two years of implementing the Agreement and allowing it greater flexibility and additional time to focus on major environmental problems. In particular, EPA contends that paragraph 4(c) actually increases its rule-making discretion under the Agreement while merely committing it to specific preliminary investigative ac-

⁷¹ *Natural Resources Defense Council, Inc. v. Train*, *supra* note 3, 8 ERC at 2127-2128.

⁷² *Id.* at 2128.

⁷³ *Id.* at 2127-2128.

⁷⁴ *Natural Resources Defense Council, Inc. v. Costle*, *supra* note 39, 12 ERC at 1843-1844.

⁷⁵ EPA is to finish identifying the pollutants and polluted waters by July 1, 1981, and is to publish its proposed strategies no later than December 31, 1981.

tion,⁷⁶ and that the changes made in paragraph 12 do not reduce the Agency's discretion.⁷⁷ The Companies, on the other hand, maintain that these new provisions require EPA to undertake a new series of programs leading to further regulations that go beyond those mandated by the original Agreement and the requirements of the 1977 Amendments. They argue that these modifications mandate that "EPA undertake specified steps and puts EPA in a straightjacket [*sic*] where, by contrast, Congress had left the Agency's discretion unfettered."⁷⁸ The Companies further argue that, because the modifications place substantial new burdens and obligations on EPA and the industries it regulates, the Agency is required to provide notice and opportunity for public comment prior to taking action of the sort it took in proposing these modifications.

In developing this argument the Companies first contend that EPA violated the notice and comment requirements of the APA's rulemaking provisions.⁷⁹ Noting that the APA defines a rule as "the whole or part of an agency statement of general or particular applicability

⁷⁶ EPA maintains that whereas paragraph 4 of the original Agreement appeared to require the Agency to promulgate pretreatment standards for all "incompatible" pollutants discharged by the 21 industries covered by the Agreement, paragraph 4(c) substantially limits its obligations by only requiring the Agency to initiate a program for investigating "incompatible" pollutants without specifying how many, and by allowing the Administrator to reduce the number of pollutants being studied at various steps in the investigatory process. In addition, the decision about which pollutants should be regulated is left to the Administrator's discretion.

⁷⁷ EPA notes that while the modifications to paragraph 12 require the Agency to develop processes for identifying contaminated waters and problem pollutants, no attempt is made to specify what these processes shall be. Moreover, the determination of the need for more stringent controls is left to the Administrator's judgment.

⁷⁸ Brief for appellants at 50.

⁷⁹ 5 U.S.C. § 553(b) & (c) (1976).

and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency,"⁸⁰ appellants argue that the modified settlement agreement amounts to a rule since "it has future effect and is designed to mandate programs leading ultimately to regulations and regulatory action * * *."⁸¹ Appellants point out that this court indicated in *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 37 (D.C. Cir. 1974), that the APA's definition of a rule "could be read literally to encompass virtually any utterance by an agency," and that Congress limited the breadth of this definition by excepting certain specified categories of agency activity. Appellants reason from this that unless the modifications can fit within one of these exceptions they must fall within the statutory definition of a rule to which the notice and comment provisions apply, and they argue that none of these exceptions applies to the modifications.

First, appellants contend that the modifications do not fall within the statutory exemption for "general statements of policy"⁸² because they substantially affect the rights of various members of the public by specifying the manner in which EPA will carry out regulatory programs and take administrative actions under the Clean Water Act.⁸³ Appellants point out that this court ruled

⁸⁰ 5 U.S.C. § 551(4) (1976).

⁸¹ Brief for appellants at 53.

⁸² 5 U.S.C. § 553(b) (1976).

⁸³ Appellants point out that in *Natural Resources Defense Council v. Costle*, 561 F.2d 904 (D.C. Cir. 1977), this court acknowledged that the Companies had a substantial interest in the settlement agreement which could be impaired if they were limited to their right to comment on the regulations issuing at the end of the processes required by the Agreement. The court made this observation in reversing the District Court's decision denying the Companies' motion to intervene in the settlement proceedings in the District Court. Appellants maintain that they have an interest in

in *Pickus v. United States Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974), that agency decisions that have substantial effects on rights are not general policy statements, and they argue that *Pickus* is a persuasive precedent for this appeal. Second, appellants maintain that the modifications cannot be said to constitute an "interpretative rule" exempt from APA notice and comment requirements. The Companies note that the court indicated in *Pickus* that this exception applies to "administrative construction of a statutory provision on a question of law reviewable in the courts * * *." *Id.* at 1113. Third, the Companies contend that the modifications are not exempt as a "rule of agency organization, procedure, or practice" which was described in *Pickus* as applying to "technical regulation of the form of agency action and proceedings." *Id.* Finally, appellants argue that the last statutory exemption—"for good cause"—also does not apply to the modifications. The Companies conclude, therefore, that the modifications to the settlement agreement fit within the statutory definition of a rule since none of the exceptions apply to them.⁶⁴

Appellants next argue that by adopting the modifications EPA contravened public participation requirements of the Clean Water Act and its own regulations. The Companies note that the Act's public participation provision states in pertinent part:

Public participation in the *development*, revision, and enforcement of any regulation, standard, efflu-

the programs established by the modifications to the settlement agreement which is equivalent to their interest in the programs set up by the original Agreement.

⁶⁴ Appellants argue that EPA would have benefitted substantially if it had sought and obtained comments on the modifications. For example, there would have been an opportunity for critical examination of some of the investigatory programs mandated by the modifications. Appellants contend that now these criticisms of the programs will merely be postponed until such time as the Agency issues regulations.

ent limitation, *plan*, or *program* established by the Administrator * * * under this chapter *shall be provided for*, encouraged, and assisted by the Administrator * * *.

33 U.S.C. § 1251(e) (Supp. II 1978) (appellants' emphasis). Arguing that the terms "plan" and "program" precisely characterize the modifications to the Agreement, appellants contend that it would be a distortion of the plain meaning of the statutory provision if it is not applied to the modifications. Appellants further note that EPA's implementing regulations call for public notice and participation prior to and during the decision-making process,⁸⁶ and that this public notice concept is well established in other "public policy" cases comparable to this one. Appellants cite as examples the practice of the Department of Justice (now required by statute) of soliciting comments on proposed consent decrees in anti-trust cases and other civil actions. Pointing out that they were given only 10 days in which to submit comments on the proposed modifications and this only *after* EPA and NRDC had agreed to them,⁸⁶ appellants argue that EPA's actions in connection with the modifications not only failed to comply with the APA or the Clean Water Act, but also contravened the Agency's regulations as well as the policies established by Congress and the Department of Justice in providing for public notice and comment in comparable cases of public concern.⁸⁷

⁸⁶ See 40 C.F.R. § 25.3(b) (1979).

⁸⁶ Appellants contend that EPA officials indicated that the Agency was not disposed to undertake substantial revisions of the proposed modifications, and they maintain that the only changes made in response to their comments were corrections of grammatical errors.

⁸⁷ Appellants further argue that EPA's actions in developing and agreeing to the modifications are deficient because they failed to comply with the requirements of Executive Order No. 12044, 43 Fed. Reg. 12661 (Mar. 24, 1978). The Companies contend that the Order complements the APA by explicitly requiring regulatory agencies to provide an opportunity for public participation in the

Appellants' final challenge to the modification of the settlement agreement is a constitutional one. They maintain that implementation of the provisions of the modified settlement agreement without public comment would violate requirements of constitutional due process. Appellants contend that if EPA had established the program contained in the modifications outside the context of a judicial proceeding it would have been required to comply with the notice and comment provisions detailed above and, in addition, provide a statement of its determinations along with appropriate factual support in an administrative record. Noting that courts have insisted on effective prior notice to parties affected by consent decrees even when dealing with agreements entered into by private parties,⁸⁸ appellants argue that due process requires that similar notice be given to the public before EPA proposed the modifications to the settlement agreement.

We do not find it necessary to resolve the disagreement between EPA and the Companies over the proper characterization of the changes made by the modifications to the settlement agreement in order to evaluate the merits of appellants' notice and comment challenges to the modifications. This disagreement really pertains to a separate objection to the modified settlement agreement which we will examine later.⁸⁹ For the moment, we

development of "significant regulations." *Id.* at 12662. Appellants maintain that the Executive Order also required EPA to prepare a "regulatory" or economic "analysis" which was to include a description and evaluation of the "major alternative ways of dealing with the problem that were considered," the "economic consequences of each of these alternatives," and "the reasons for choosing one alternative over the others." *Id.*

⁸⁸ Appellants cite *Cunningham v. English*, 269 F.2d 539 (D.C. Cir.), cert. denied, 361 U.S. 905 (1959), as an illustration of this principle.

⁸⁹ See Part II-D *infra*.

simply assume the Companies are correct in claiming that the modifications impose fairly substantial obligations on the Agency.⁹⁰ We do not agree with the Companies' contention that the modifications are "rules" within the meaning of the APA for which EPA was required to comply with the statute's notice and comment provisions. All paragraphs 4(c) and 12 of the modified settlement agreement require EPA to do is initiate preliminary investigations as a first step toward determining whether or not to promulgate regulations. The Companies have not cited a single case in which a court has held that action as preliminary to the regulatory process as this constitutes rulemaking for which notice and comment are required. To the contrary, the few courts that have addressed similar notice and comment challenges to agency actions analogous to that in this case have ruled that such actions do not constitute rulemaking. In *Appeal of FTC Line of Business Report Litigation*, 595 F.2d 685 (D.C. Cir. 1978), this court rejected a suggestion that the FTC was required to observe APA notice and comment procedures when exercising its statutory authority to require certain companies to submit data it needed for an investigatory program. The companies had argued that, since the data would be used for regulatory purposes, the collection of data itself was also a prescription of law or policy within the meaning of the APA's definition of a "rule." In dismissing this argument the court noted that "[i]f the collection of information is considered a prescription of law and policy because of the possible regulatory uses to which the information may be put, then all types of compulsory process the product of which

⁹⁰ Appellants' notice and comment arguments are sometimes presented as objections to the original settlement agreement as well as the modifications. See, e.g., reply brief for appellants at 30-31 & n.20. Since the Companies did not object to the District Court order approving the original settlement agreement, they may not now raise notice and comment objections to the original agreement. Thus our consideration of their notice and comment challenges is limited to the modifications.

may be put to regulatory use—including subpoenas—would similarly require rulemaking.” *Id.* at 695 n.48. See also *United States v. W. H. Hodges & Co.*, 533 F.2d 276 (5th Cir. 1976); *Montship Lines, Ltd. v. Federal Maritime Board*, 295 F.2d 147 (D.C. Cir. 1961). The key point recognized by these cases is that agency investigatory activities preliminary to promulgating regulations are not subject to APA notice and comment requirements. Unlike the situation in *FTC Line of Business Report Litigation*, the Agency’s action in this case will have no immediate or direct effect on the Companies or the general public; neither the modifications themselves, nor the investigatory program they establish, require any action on the part of the public or the Companies.⁹¹ If and when EPA decides to promulgate regulations after completing its investigations, the Companies and the general public will have ample opportunity to participate in the rulemaking process. Any objections the Companies have to the Agency’s investigatory program can be raised at that time.

The Companies’ claim that the modifications “substantially affect[] the rights of various members of the public, including Appellants,”⁹² appears to be based on their belief that if EPA had adopted the investigatory pro-

⁹¹ In contrast, the FTC order in *FTC Line of Business Report Litigation* actually required the companies to do something—prepare and submit the requested reports. Appellants attempt to distinguish the latter case from the one at bar by suggesting that the FTC program involved data collection only, whereas the modifications set up programs for both data collection and data evaluation. In fact the FTC program was not limited to data collection. See *Appeal of FTC Line of Business Report Litigation*, 595 F.2d 685, 690-693 (D.C. Cir. 1978). Moreover, the mere fact that an investigatory program includes both data collection and data evaluation (it is difficult to imagine how there can be an investigatory program which does not involve evaluation) does not make it a rule for which notice and comment must be allowed.

⁹² Brief for appellants at 55.

grams specified by the modifications outside the context of a judicial proceeding it would have been required to comply with APA notice and comment procedures. It is difficult to believe that the Companies intend this as a serious argument. EPA has no legal obligation to inform the public of its investigatory activities, much less an obligation to provide an opportunity for comment on such activities. Under the Clean Water Act and various other statutes the Agency is constantly making determinations concerning how it will gather information for future rule-making, which pollutants or industries should be given special attention, and how limited Agency resources are to be allocated. Were we to accept the Companies' suggestion, EPA would be required to allow notice and comment before making any of these decisions. This suggestion is untenable.⁹³

Nor do we believe that the modifications necessarily exclude the Companies or any other members of the public from participating in the investigatory programs that EPA agreed to initiate. The Agency is free to request the Companies' participation in collecting and evaluating data pursuant to these investigatory programs, although it is not required to do so. Indeed, in *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975), this court observed that EPA's practice in developing effluent limitation guidelines has been to solicit comments on the preliminary findings of its investigatory programs before publishing proposed regulations. *Id.* at 712-713 n.105. We have no reason to expect that the Agency will depart from this sound practice. Moreover, under the terms of the settlement agree-

⁹³ Under this theory EPA would be required to initiate "rule-making" proceedings to decide what investigatory programs it can set up to help it determine whether it should undertake to promulgate regulations. It is not immediately clear why this first "rule-making" should not itself be preceded by "rulemaking" to determine what procedures should be employed to decide whether there is a need for an investigatory program in the first place.

ment the Companies are entitled to receive from APA quarterly briefings on the Agency's progress toward implementing the Agreement. The Companies can raise any problems they may have about the procedures the modifications require at these meetings.

Finally, we do not believe that this court's decision in the *Pickus* case offers any support for appellants' position. *Pickus* involved the question whether a parole board was required to comply with APA notice and comment requirements before adopting a list of guidelines to govern its parole decisions. The guidelines established specific factors that would be considered by the board in making parole decisions and the weight that would be given to each of the factors. Thus, unlike the instant case, *Pickus* did not involve a situation in which the agency had merely agreed to undertake preliminary investigations designed to help it decide whether or not it should issue regulations. The guidelines had an immediate and direct effect on applicants for parole inasmuch as they determined whether or not the requests would be granted. The parallel to the situation in the instant case would be if the parole board in *Pickus* had agreed to employ certain procedures in conducting a study to determine whether guidelines should be promulgated.²⁴

We also do not agree with the Companies' contention that EPA contravened public participation requirements of the Clean Water Act and its own regulations in proposing the modifications. It should be noted that the Companies' claim that the modifications are "plans" and

²⁴ We also do not believe that the Companies' reliance on this court's decision in *Natural Resources Defense Council v. Costle*, *supra* note 87, helps their case. Our conclusion in that case that the Companies had an interest in the settlement proceedings which satisfied the requirements for intervention pursuant to Fed.R.Civ.P. 24(a) does not establish that the modifications have the type of immediate and direct effect on the Companies that is a prerequisite to a finding that the modifications constituted rulemaking within the meaning of the APA.

"programs" within the meaning of the CWA's public participation provisions rests exclusively on their assertion that this is the case. However, EPA has published interpretative regulations which define the precise scope of the "plans" and "programs" covered by the CWA's public participation provisions. These regulations were issued pursuant to the statutory requirement that "[t]he Administrator . . . develop and publish regulations specifying minimum guidelines for public participation" ⁹⁵ The regulations make it clear that CWA's "plans" and "programs" refer to those that are supported by EPA financial assistance and not to Agency investigatory activities of the sort envisaged by the modifications to the settlement agreement.⁹⁶ EPA's interpretation of the statute is reasonable, and it is well established that an agency's interpretation of the statutes it is charged with administering is entitled to considerable deference from the courts. See *E. I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112, 134-135 (1977); *Union Electric Co. v. EPA*, 427 U.S. 246, 256 (1976); *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975); *Hercules, Inc. v. EPA*, *supra*, 598 F.2d at 101; *Ethyl Corp. v. EPA*, 541 F.2d 1, 12 n.16 (D.C. Cir.) (*en banc*), *cert. denied*, 426 U.S. 941 (1976). Deference to the agency's interpretation is particularly appropriate where, as here, the statute specifically requires the agency to develop implementing regulations.⁹⁷ Accord-

⁹⁵ 33 U.S.C. § 1251(e) (Supp. II 1978).

⁹⁶ See 40 C.F.R. § 25.2(a) (5) (1979).

⁹⁷ It should be noted that even if we were to agree with plaintiffs' suggestion that the CWA's public participation provisions apply to the modifications, we would still reject their contention that EPA contravened these requirements. Neither the CWA nor EPA's implementing regulations establish any requirement that "plans" and "programs" be subject to formal notice and comment. The CWA does not set forth any specific mechanisms for public participation and EPA's regulations confirm this fact. See 44 Fed. Reg. 10286 (Feb. 16, 1979).

ingly, we find no basis for appellants' contention that EPA contravened public participation requirements of the Clean Water Act and its own regulations.

Finally, we perceive little merit in appellants' claim that EPA's action in agreeing to the modifications deprived them of constitutional due process rights to effective notice. To be sure, appellants may have an "interest" in the results of EPA's investigations. However, this alone does not establish a constitutional entitlement to "effective notice" from EPA prior to proposing the modifications. As we have already indicated, the Companies have not shown that the investigatory program envisaged by the modifications will have an immediate and direct effect on their activities. If after completing its investigation EPA decides to promulgate regulations—and it is these regulations that will impose any requirements on the Companies—appellants will have ample opportunity to participate in rulemaking proceedings. This is all that is required to safeguard any due process rights appellants may have. Moreover, even assuming *arguendo* that the Companies were entitled to notice, we are not persuaded that they were not given adequate opportunity to comment on the modifications. EPA distributed copies of the proposed modifications to the Companies on November 28, 1978 and allowed them ten days in which to file comments on the proposals, which they did. The proposed joint modification was not submitted to the District Court until December 15, 1978, and pursuant to a schedule approved by the parties the Companies had until January 5, 1979 to file comments on the proposed modifications. Rather than commenting on the proposals, the Companies chose to concentrate their attention on their argument that the settlement agreement should be vacated. In these circumstances, we believe that the Companies were allowed adequate opportunity to comment on the proposed modifications, and thus we cannot

agree with their claim that they were denied effective notice.⁹⁸

D. *Restrictions on the Administrator's Discretion*

During oral argument in these cases we directed the parties' attention to an issue that was not discussed in the briefs,⁹⁹ and which apparently was not raised before the District Court either at the time the original settlement agreement was adopted or at the time of the modifications. Briefly stated, the issue concerns whether the modified settlement agreement impermissibly infringes on the discretion Congress committed to the Administrator to make certain decisions under the CWA by binding EPA to follow certain procedures and use certain decision-making criteria not mandated by the statute. After oral argument NRDC filed a Suggestion for Post-Argument Briefs in which it proposed that the parties be allowed to file supplemental briefs addressing two questions:

(a) whether it is ever within the authority of a district court to enter and enforce a consent judgment which restricts the discretion an agency might otherwise have in selecting the means by which it will meet its mandatory responsibilities under a general framework statute; and

⁹⁸ We also reject appellants' suggestion that EPA contravened Executive Order No. 12044. Even assuming that this Order is judicially enforceable, *but see Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976), by its very terms the Order only applies to "significant regulations." As we have already indicated, the modifications do not establish any regulations so the Order does not apply to this case. We should also add that appellants' "public policy" arguments that EPA should have provided notice and an opportunity for comment, even if correct, do not create any legal requirements.

⁹⁹ The Companies' briefs adverted to this issue in connection with their argument that the modifications constituted rulemaking, but did not present it as an independent objection to the modified settlement agreement.

(b) whether in fact that is what the district court has done in these cases.¹⁰⁰

We granted NRDC's suggestion and directed the parties to file supplemental briefs.

After reviewing these supplemental briefs we conclude that the issue of whether the modified agreement impermissibly infringes on the Administrator's discretion should be presented in the first instance to the District Court. First, because the question was not raised below the District Court has not had an opportunity to rule on this issue or to consider its implications in fashioning the decree. Second, there has been no opportunity for the parties to develop a record that will enable us to make the preliminary determination of just what restrictions the modified agreement purports to place on the Administrator's discretion. In its present posture the record of these cases does not contain any of the facts that are necessary to ascertain the true effect of the Agreement on the Administrator's present or future actions. EPA for example, seems to attach no particular significance to the fact that the Agreement is embodied in a court order, arguing that the conditions in the Agreement are ones the Administrator could have voluntarily imposed upon himself in the normal course of agency decisionmaking, and that the only critical issue in these cases is whether the modifications required the Agency to undertake rulemaking. It is not clear whether EPA means to suggest by this that it considers itself bound to follow the procedures and decisionmaking criteria set out in the Agreement only for as long as the Administrator deems them appropriate.¹⁰¹ Third, EPA

¹⁰⁰ Supplemental brief for appellee NRDC at 3 n.4.

¹⁰¹ It is not clear whether NRDC's suggestion that the District Court is free to amend the decree to accommodate any legitimate change of mind the Administrator may have, *see* supplemental brief for appellee NRDC at 28-32, indicates that it agrees with this.

points out that a decision on the first question posed in NRDC's Suggestion may have far-reaching implications affecting other federal departments and agencies, and that a complete exposition of the government's views therefore requires consultations with other agencies and the Department of Justice.¹⁰² We agree that a decision on this issue, should it prove to be necessary, must be made on the basis of a record more fully developed than the one presently available to us. Moreover, EPA should be allowed an opportunity to consult with other agencies that may be affected by a decision on this important issue before being required to take a position. Remand to the District Court will allow these consultations to take place and the court's decision will be informed by the government's considered position on the matter.

III

Although we agree with the District Court's decision insofar as it rejected the Companies' challenges to the modified settlement agreement, we conclude that these cases must be remanded to the District Court for consideration of the question whether the modified settlement agreement impermissibly infringes on the discretion Congress committed to the Administrator to make certain decisions under the statute.

Affirmed and remanded.

¹⁰² See Response of the Administrator of the Environmental Protection Agency to the Court's Order of April 17, 1980 at 2.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 79-1473

ENVIRONMENTAL DEFENSE FUND, INC., a Nonprofit
New York Corporation, *et al.*

v.

DOUGLAS M. COSTLE, as Administrator, Environmental
Protection Agency, *et al.*

AMERICAN IRON AND STEEL INSTITUTE *et al.*,
Appellants

And Consolidated Cases Nos. 79-1474 thru 79-1476
(Civil Actions Nos. 75-0172, 2153-73, 75-1267, and 75-1698)

[Filed September 16, 1980]

Before: WRIGHT, *Chief Judge*, and SWYGERT * and
ROBINSON, *Circuit Judges*.

ORDER

It is ORDERED by the court, *sua sponte*, that the
opinion for the court filed herein this day be, and it is
hereby, amended by changing "object to" in line four of
footnote 90 on page 50 to "appeal".

Per Curiam

For the Court

/s/ George A. Fisher
Clerk

* Of the Seventh Circuit, sitting by designation pursuant to 28
U.S.C. § 291(a) (1976).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 79-1473

ENVIRONMENTAL DEFENSE FUND, INC., a Nonprofit
New York Corporation, *et al.*

v.

DOUGLAS M. COSTLE, as Administrator, Environmental
Protection Agency, *et al.*

AMERICAN IRON AND STEEL INSTITUTE *et al.*,
Appellants

And Consolidated Cases Nos. 79-1474 thru 79-1476
(Civil Actions Nos. 75-0172, 2153-73, 75-1267, and 75-1698)

[Filed September 19, 1984]

Before WRIGHT, *Chief Judge*, and SWYGERT * and
ROBINSON, *Circuit Judges*.

ORDER

It is ORDERED by the court, *sua sponte*, that the
opinion for the court filed herein on September 16, 1980
be, and it is hereby, amended as follows.

On page 2, change "*Aree*" in the 4th line to "*Agee*"

On page 3, change "*compannies*" in the 1st line of
footnote 1 to "*companies*"

On page 5, insert a period after "*Law*" in the next
to last line of footnote 7

Per Curiam

For the Court

/s/ George A. Fisher
Clerk

* Of the Seventh Circuit, sitting by designation pursuant to 28
U.S.C. § 291(a) (1976).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2153-73, 75-0172, 75-1698, 75-1267

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

Plaintiffs,
v.

ANNE M. GORSUCH, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Defendants
and

UNION CARBIDE CORPORATION, ET AL.,
Intervenors.

[Filed February 5, 1982]

MEMORANDUM OPINION

This matter comes before the court on remand from the Court of Appeals. The sole issue remanded for consideration is: Whether the settlement agreement ("the agreement or decree") reached in this case impermissibly infringes on the discretion Congress granted to the Administrator of the Environmental Protection Agency ("EPA") to make certain decisions under the Federal Water Pollution Control Act ("FWPCA").¹

¹ Although none of the parties had originally raised this issue, this court had considered its implications throughout the settlement process. For example, at an April 30, 1976 status call on the eve of settlement, after examining the parties' proposed paragraph 8(c), this court observed:

Now that, as I view it, would put the court in a position of supervising the discretionary actions of the EPA until conceivably 1983 or beyond. I don't intend to undertake any such role, and I don't think it is a proper judicial role.

Transcript at 4. As a result, the paragraph was modified.

Although the Court of Appeals had addressed this issue at oral argument and had allowed the parties the opportunity to file supple-

BACKGROUND

Between 1973 and 1975 five environmental groups (collectively referred to as "NRDC") brought four separate lawsuits against EPA to rectify the agency's alleged failure to implement several key provisions of the FWPCA. 33 U.S.C. § 1251 *et seq.* (1976). The first lawsuit challenged the criteria EPA was using to decide which pollutants to include in a list of toxic pollutants which the agency was required to compile by Section 307(a) of the FWPCA, and also sought to expand EPA's then existing list of toxic pollutants. The second and third lawsuits were aimed at compelling EPA to promulgate effluent discharge standards for the substances already on the agency's list of toxic pollutants. The fourth lawsuit sought an order requiring EPA to promulgate pretreatment standards under Section 307(b) of the FWPCA covering approximately 35 industries and a wide variety of pollutants.

While these lawsuits were pending, EPA officials conducted a thorough review of the agency's strategy for controlling toxic pollutant emissions. They concluded that there was a need to replace the agency's then existing approach with a new strategy calling for an integrated pro-

mental briefs on the issue, that Court determined that this issue should be remanded to this court for three reasons: 1) to allow this court to rule on the issue and consider its implications in fashioning the decree, 2) to enable the parties to develop a record of what restrictions the modified agreement placed on the Administrator's discretion, and 3) to allow EPA to consult with other federal departments and agencies to obtain a complete exposition of the government's views on this important issue. *See Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 1258-59 (D.C. Cir. 1980). Pursuant to this directive, "the Department of Justice has solicited the views of its own divisions and of other departments, agencies and commissions of the federal government" and these viewpoints are reflected in the Government's position in this case. *See Defendant's Opposition to Intervenor's Joint Motion to Vacate or, Alternatively, to Revise The Decree And In Support of Defendant's Cross-Motion to Modify The Decree (hereinafter "Defendant's Opposition")* at 1-2.

gram for controlling toxic pollutants. EPA officials also felt that development of such a new approach could provide a basis for resolving the controversies involved in the pending lawsuits. After the general outlines of the new program were developed, EPA and NRDC, joined by various industry intervenors, began settlement negotiations. After tentative agreement was reached between EPA and NRDC, a proposed settlement agreement was submitted to this court. Several hearings were held on the proposed agreement and interested parties were allowed to file comments on it. Representatives of various industries intervened in these proceedings and filed comments vigorously opposing the proposed agreement. After making several modifications to the agreement, this court, on June 8, 1976, approved the agreement finding it a "just, fair, and equitable resolution of the issues raised." *Natural Resources Defense Council, Inc. v. Train*, 8 ERC 2120, 2122 (D.D.C. 1976). No appeal was taken from this court's order adopting the settlement agreement.

Basically, the settlement agreement outlines a comprehensive strategy for the regulation of toxic pollutant discharges under the FWPCA, including details concerning the timing, scope, and nature of the programs that EPA is to initiate. Under the agreement, EPA proposes to regulate the discharge of toxic pollutants by developing effluent limitations, guidelines and performance standards for new and existing emission sources, as well as pretreatment standards regulating the introduction of pollutants into treatment works. These limitations, guidelines and standards cover 21 major industries and 65 specified pollutants or groups of pollutants. Further, EPA agreed to employ technology-based controls in promulgating these guidelines and limitations. The new pretreatment standards are to apply to any of the 65 pollutants listed in the agreement and to any other pollutants that prove to be incompatible with "publicly owned treatment works." Promulgation of the regula-

tions envisaged by the agreement was to take place according to a phased schedule running through December 31, 1979, and the affected industries were to comply with the regulations by June 30, 1983.

This original schedule was not adhered to however, and in 1978, NRDC moved to hold the Administrator of EPA in contempt for failing to meet the timetables provided by the original decree. Several intervenors then moved to vacate the decree on the grounds that the 1977 amendments to the Clean Water Act had superseded the decree and rendered it moot and that the decree violated the Administrative Procedure Act's notice and comment provisions. NRDC and EPA then jointly moved this court for an order adopting certain modifications to the decree in settlement of NRDC's pending contempt motion. On March 9, 1979, this court modified the decree in accordance with the joint request of EPA and NRDC and denied the intervenors' motion to vacate the decree. *Natural Resources Defense Council, Inc. v. Costle*, 12 ERC 1833 (D.D.C. 1979). Certain intervenors appealed that order by this court to the Court of Appeals. The Court of Appeals rejected all of the intervenors' arguments and affirmed the decision of this court on the issues raised by the parties, but, as noted above, the Court of Appeals remanded the case to this court for consideration of the "impermissible infringement" issue.

DISCUSSION

Introduction

After a detailed study of the policies and precedents both supporting and denying the power of a trial court to fashion a detailed equitable decree, such as the decree approved in the instant case, it is the court's opinion that the instant settlement agreement does not impermissibly infringe on the EPA Administrator's discretion to make certain decisions and to take certain actions under the

FWPCA. Before discussing the various factors underlying this decision, as a preliminary matter it should be noted that the focus of this analysis is on an "impermissible" infringement of the Administrator's discretion, not just an infringement. In the broad sense of the term, any judicial decision compelling agency action infringes to some degree on an agency's discretion, yet it is only when that infringement reaches a certain level and/or produces a certain effect that it becomes "impermissible." There is no doubt that the instant settlement agreement infringes to some degree on the EPA Administrator's discretion, but for the reasons discussed below this court does not believe that this infringement is impermissible.

A. The Parties' Positions

Subsequent to the Court of Appeals' remand in this case, the intervenors, comprised of representatives of various industries likely to be affected by implementation of the decree, seized upon the issue remanded by the Court of Appeals and made it the focal point of a motion to vacate the consent decree (i.e. they moved to vacate the consent decree on the ground that it impermissibly infringed upon the Administrator's discretion under the FWPCA). *See* Intervenor's Motion to Vacate the Decree Or, Alternatively, To Revise The Decree. In support of this position, the intervenors argue that the decree compels the EPA to take certain actions, which actions effect certain results under the FWPCA; the effecting of these results, according to the intervenors, should properly reside within the discretion of the Administrator.²

² Intervenor's also suggest that this court has exceeded its Article III powers in both entering and modifying the instant agreement. In this argument, intervenors maintain that the court has gone beyond the Constitution's "case or controversy" limitation by exercising both legislative and administrative powers in connection with this decree and by approving a settlement agreement which exceeds the parameters of the original dispute between the parties. *Id.* at 19-21. The court finds that these arguments plainly lack merit.

The original adverse parties in this action, NRDC and EPA, both argue that the instant decree is perfectly permissible. It is the Government's position that "there is no basis in fact, law or policy for holding that the decree constitutes an impermissible exercise of judicial power." Defendant's Opposition at 4. EPA maintains that any impermissible infringement argument in this case is simply not congruent with the facts of the case; these facts reveal that in entering into the decree "the then-Administrator not only consented to its terms in order to avoid risks of continued litigation, but exercised his independent judgment that the decree provided an appropriate means of implementing the Act." *Id.* Finally, and perhaps most importantly, EPA argues that the decree does not prescribe any substantive rules or outcomes under the FWPCA, but instead leaves the substance of all final agency action solely in the hands of the EPA.

Similarly, NRDC argues that the instant decree is permissible because it "does not require this Court to become involved in the affairs of EPA," *see* Opposition by NRDC et al. to Motion to Vacate The Consent Decree Or, Alternatively, To Revise The Decree (hereinafter "Plaintiffs' Opposition") at 2, but instead merely establishes a process for EPA to follow. *Id.* at 8. As a participant in the bargaining process which culminated in this decree, NRDC places particular importance on the fact that this process was both formulated in the first instance and later agreed to by the EPA in the exercise of its independent judgment. *See id.* at 4 & 8. Finally, NRDC notes that the original decree in this case has received express congressional support, which support clearly indicates that the decree does not impermissibly infringe on the discretion given to EPA by Congress under the FWPCA. *Id.* at 21-23.

I.

"In order to give effect to remedial statutes, the equitable powers of the federal courts are particularly broad,

and the courts may utilize flexible and novel approaches to implement congressional intent." *Handler v. Securities and Exchange Commission*, 610 F.2d 656-659 (9th Cir. 1979) (citing *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946)). Further, these equitable powers are greatest where the public interest is involved. See *Antone v. Block*, No. 80-1053 slip op. at 11-12 (D.C. Cir. Aug. 10, 1981); *Natural Resources Defense Council v. Train*, 510 F.2d 692 (D.C. Cir. 1975). In the instant case where the agency has failed to implement a congressionally sanctioned process aimed at protecting the public from toxic pollutants, it is clear that the public interest is heavily in favor of compelling agency action.

A review of the cases discussing a trial court's power to utilize a detailed equitable decree reveals that certain definite factors are crucial to the viability of any decree. The first such factor is the presence of unlawful or impermissible agency action. This link to unlawful activity is important because in its absence the courts are unwilling to uphold detailed decrees fashioned by trial courts.² See *Antone v. Block*, *supra*, slip op. at 10-11; *Natural Resources Defense Council v. Train*, 510 F.2d at 711. In the present case, the aggregate record of the EPA with regard to the regulation of these toxic pollutants can be considered equivalent to administrative action unlawfully withheld. *American Dairy of Evansville v. Bergland*, 627 F.2d 1252, 1262 (D.C. Cir. 1980). Section 706(1) of the Administrative Procedure Act gives the courts the power to compel administrative action in such circumstances. *Id.*

² This link to unlawful activity is arguably less important in this case where the court is not actually imposing a decree upon the parties, but is instead condoning their own settlement decree. See text *infra* at 8-9. In fact, by settling EPA may be tacitly admitting at least some level of impropriety on its part. See Defendant's Opposition at 5 (agency legitimately perceived risk of losing lawsuits, which loss could have subjected agency to court orders severely restricting its discretion) and at 7 (NRDC had colorable claim and stood reasonable chance of obtaining court order).

Once the hurdle of original authority to fashion a decree is cleared, the primary touchstone for determining whether any given decree impermissibly infringes on an agency's discretion appears to be whether the decree is result or procedure oriented. Compare *National Association of Postal Supervisors v. United States Postal Service*, 602 F.2d 420 (D.C. Cir. 1979) (district court ordered specific pay raise; decree invalid) and *Huntt v. Government of the Virgin Islands*, 382 F.2d 38 (7th Cir. 1967) (district court ordered specific performance of contract against apparent legislative will, decree invalid) with *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*) (district court ordered procedure for HEW to follow; decree valid). In fact, in *Adams* an *en banc* panel of this circuit's Court of Appeals placed heavy emphasis on this distinction: "Far from dictating the final result with regard to any of these [school] districts, the order merely requires initiation of a process which, excepting contemptuous conduct, will then pass beyond the District Court's continuing control and supervision." *Adams*, 480 F.2d at 1163 n.5. The instant settlement agreement does not seek to control any of the EPA's final results, which are lawfully within the province of the agency alone to determine, but instead merely seeks to compel the EPA to implement the process that Congress intended to provide to protect both this nation's waters and the users of those waters.⁴ As a process-

⁴ This court has consciously strived to maintain the process-oriented nature of this settlement agreement. For example, in entering the decree this court noted:

Of special concern was the degree to which the agreement required the court to become involved in the affairs of EPA . . . specifically, the court will not review substantive judgments of the EPA as the original decree appeared to require The key difference between the modified agreement and the original, however, is that this is a proper burden for the court to bear.

NRDC v. Train, 8 ERC at 2121. The court also took care to ensure that the 1979 modifications constituted a proper exercise of judicial power. See *NRDC v. Costle*, 12 ERC at 1840.

oriented decree, the instant settlement agreement does not impermissibly infringe on the EPA's discretion.

The next factor furnishing support for the upholding of a detailed equitable decree is the extent to which the parties are allowed to participate in the formulation of the court's decree. See *Handler*, 610 F.2d at 658 & 660 (placing weight on fact that parties agreed to special investigation as part of consent decree); *NRDC v. Train*, 510 F.2d at 705 (fact that parties allowed to draft decree helps to ensure workability); cf. *Adams*, 480 F.2d at 1165 (in upholding plan over objection, court of appeals relies on fact that the trial court's decree was supported by testimony of objecting party). Obviously the chance to participate in the formulation of the decree greatly lessens the intrusive, infringing aspects of the decree when it is finally implemented.

This participation factor is particularly relevant in the instant case where the parties were the prime formulators of the decree; this court did not dictate a course of action to the Administrator, but merely approved what he had formulated in the first instance and then voluntarily agreed to undertake. In fact, the agency has affirmatively exercised its discretion to undertake the acts set forth in the decree and to settle litigation, thereby enabling it to exercise its discretion in the way it deemed best. The agreement actually freed the agency from restrictions arising from the lawsuits and allowed the agency the requisite flexibility to exercise its discretion. See *United States v. Ketchikan Pulp Co.*, 430 F. Supp. 83, 85 (D. Alaska 1977) (EPA's implementation of FWPCA facilitated by ability to negotiate settlements in contested litigation). As such, the instant settlement agreement is more of an accommodation to rather than an infringement upon the Administrator's discretion. See Defendant's Opposition at 12 (settlement allowed EPA to implement preferred regulatory approach by removing threat of continued litigation over that approach).

The final factor, according to the caselaw, contributing to the support for extensive equitable decrees is flexibility; "[f]lexibility rather than rigidity has distinguished equity jurisprudence." *NRDC v. Train*, 510 F.2d at 713. The fact that the party subject to an extensive decree can petition the court to modify the decree if circumstances change, and if convincing can have the court effect the desired modification, lessens the potential intrusion and infringement caused by an extensive decree. See *NRDC v. Train*, 510 F.2d at 705 (court's willingness to entertain objections buttresses party participation and makes decree palatable); *Adams*, 480 F.2d at 1163. In the instant case, this court has indicated such a willingness to respond to objections by the parties; the settlement agreement has already been modified a number of times and, at present, there is another such motion to modify awaiting briefing and oral argument. The fact that the court has adopted a flexible approach to the decree also compels the conclusion that the instant decree does not impermissibly infringe upon EPA's discretion.

II.

Although the relevant caselaw factors discussed above provide ample support for finding that the instant agreement does not impermissibly infringe on the EPA Administrator's discretion, the instant case possesses further persuasive non-caselaw support for the settlement agreement: express congressional approval. In enacting the 1977 Amendments to the FWPCA, Congress clearly had the instant settlement agreement in mind and clearly approved of its procedures. For example, Senator Muskie, the architect of the 1972 FWPCA and the Senate floor manager of the Conference Report in 1977, told the Senate:

Another, and possibly more important, reason for maintaining the BAT requirements is that the Agency currently has a major program underway of

using BAT to control toxics. Technology-based effluent limitations are being developed which will place limits on toxic pollutants which pose or are likely to pose human health and ecological hazards.

The conference agreement was specifically designed to codify the so-called "Flannery decision," which set forth 65 families of pollutants which are to be regulated by BAT, and EPA has been implementing this consent decree. To take a different course for dealing with toxics at this point would require a major reprogramming of EPA resources. Such a delay, whether it be to allow utilization of a different section of the act or in order to implement this section, would only cause confusion and add still more delay to efforts to solve the toxics problem. The discharge of toxic pollutants should be eliminated as soon as possible. Because EPA is already embarked upon a program to control toxics using a proven mechanism, technology-based effluent limitations, and because of the urgency to control toxics, prudent public policy demands that this policy be maintained.

123 Cong. Rec. S. 19647-48 (daily ed. Dec. 15, 1977). See also S. Rep. No. 95-370 at 56 (noting Committee approval and endorsement of strategy contained in decree), reprinted in, [1977] U.S. Code Cong. & Ad. News at 4380. The Court of Appeals specifically noted this congressional approval. *Environmental Defense Fund, Inc. v. Costle*, 636 F.2d at 1242. The fact that Congress has placed its imprimatur on the procedures established by the instant settlement agreement provides substantial support for finding that this decree does not impermissibly infringe upon the EPA Administrator's discretion.

CONCLUSION

In light of the failure of the EPA to meet its acknowledged duties under the FWPCA and in light of the fact that the agency was subject to suit for the failure to

perform these duties, the parties' decision to enter into a settlement agreement, and this court's decision to ratify and supervise it, constituted reasonable steps to assure early efforts by the delinquent defendant toward eventual discharge of its statutory responsibilities. *See NRDC v. Train*, 510 F.2d at 704-05. Further,

sound principles counsel resort to a structured type of order where the court seeks to compel completion of a task which will necessarily extend over a substantial period. Requiring the courts to rely on mere exhortation to move with expedition toward compliance within a "reasonable time" would undercut their ability to spur reticent defendants to render the performance to which the plaintiff and the public are entitled. The authority to set enforceable deadlines both of an ultimate and an intermediate nature is an appropriate procedure for exercise of the court's equity powers to vindicate the public interest.

Id. As a result, this court finds that the instant settlement agreement does not impermissibly infringe upon the discretion accorded to the EPA Administrator by Congress.

An appropriate Order accompanies this Memorandum Opinion.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2153-73
75-0172
75-1698
75-1267

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Plaintiffs,

v.

ANNE M. GORSUCH, Administrator of the
Environmental Protection Agency, *et al.*,
Defendants.

and

UNION CARBIDE CORPORATION, *et al.*,
Intervenors.

[Filed February 5, 1982]

ORDER

This matter came before the court on remand from the Court of Appeals. After considering all the memoranda submitted by the parties in connection with the remanded issue before this court and for good cause shown, it is, by the court, this 5th day of February, 1982

ORDERED that the intervenors' motion to vacate or, in the alternative to revise, the instant settlement agreement on the grounds that said agreement impermissibly infringes upon the discretion granted to the Administrator of the EPA by Congress is, for the reasons stated in the accompanying Memorandum Opinion, hereby denied.

/s/ Thomas A. Flannery
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Nos. 2153-73
75-0172
75-1267
75-1698

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Plaintiffs,

v.

ANNE M. GORSUCH, Administrator of the
Environmental Protection Agency, *et al.*,
Defendants.

and

UNION CARBIDE CORPORATION, *et al.*,
Intervenors.

[Filed May 7, 1982]

ORDER

This matter is before the court on Defendants' amended Cross-Motion to Modify the Consent Decree in these consolidated cases. Upon consideration of Defendants' motion and supporting affidavits and Plaintiffs' response thereto, and the Court having heard oral argument of all counsel, the court finds that at the present time the defendants have presented insufficient justification for revising the consent decree in these cases. While recognizing that the defendant agency has in fact been working under the decree since its inception, the court believes that at this point in time the EPA must be pushed to work harder. On this point, the court finds it noteworthy that the statutory compliance date for the industries affected by EPA's regulations in this area is July 1, 1984, a date which is rapidly approaching. A further consideration behind the court's decision is the fact that paragraph 8(a)(4) of the consent decree already provides a proce-

whereby EPA can move to effect some of the modifications presently urged upon the court.

In making this decision, the court recognizes the need to retain flexibility in the supervision and implementation of this decree. However, at this time, the requested flexibility appears unwarranted. At this time, the court hopes that this Order will "serve like adrenalin, to heighten the response and to stimulate the fullest use of resources" at EPA; if this results in over-stimulation of the agency or if other compelling circumstances indicate the need for palliative measures at some later date, then such measures can be taken by the court at that time. *See Natural Resources Defense Council v. Train*, 610 F.2d 697, 712 (D.C. Cir. 1975). As a result, it is, by the court, this 7th day of May, 1982,

ORDERED that the Cross-Motion to Modify the Consent Decree, as amended, be and hereby is, denied; and it is further

ORDERED that on or before June 21, 1982, defendants shall file with the court and serve on all counsel a schedule of suggested dates for proposing and promulgating each of the following sets of regulations: Aluminum Forming; Battery Manufacturing; Coal Mining; Coil Coating; Copper Forming; Electric & Electronic Components; Foundries; Ink; Inorganic Chemicals (Phase 1); Iron & Steel; Leather Tanning & Finishing; Metal Finishing; Nonferrous Metals (Phase 1); Ore Mining; Organic Chemicals and Plastics & Synthetic Materials; Paint; Pesticides; Petroleum Refining; Pharmaceuticals; Porcelain Enameling; Pulp & Paper; Steam Electric; Textile Mills; and Timber;¹ and it is further

¹ From section D.6(b) of the defendants' proposed order on this motion, it appears that this Timber regulation has already been promulgated; if this is true, then, of course, defendant need not propose a schedule for its promulgation. Because it was included in the defendants' proposed order, this court has, out of an abundance of caution, decided to include it in this order.

ORDERED that defendants' schedule shall conform to the following *restrictions*:

1. All regulations previously proposed by defendants shall be promulgated as expeditiously as possible, but no later than 180 days from the date of this order,²

2. All regulations not previously proposed by defendants shall be proposed as expeditiously as possible, but no later than 180 days from the date of this order, and shall be promulgated as expeditiously as possible thereafter, but no later than 180 days following proposal,

3. In developing the most expeditious schedule possible within these restrictions, defendants shall conform their actions to the following *conditions*:

(a) The schedule shall contain no additional material delays for considering changes in cost data due to changes in regulations under the Resource Conservation and Recovery Act.

(b) The schedule shall contain no time (beyond that required by Agency reviews, as prescribed by condition (d), below) for reviews of any proposals or promulgations of regulations by the Office of Management and Budget under Executive Order 12291, or any delays to prepare impact assessments pursuant to E.O. 12291.³

(c) The schedule shall reflect all possible internal and external agency actions, under defendants' authority to accomplish or request, for minimizing or eliminating any

² This will only force the EPA to promulgate three of the thirteen currently proposed regulations in a shorter time period than the agency itself had requested. See Defendant's Proposed Order at Section D.6(b) (requested schedule for regulation proposal and promulgation).

³ The regulations at issue in this case appear, in any event, to be exempted from the strictures of Executive Order 12291. See Executive Order 12291, Section 8(a)(2), 46 *Fed. Reg.* 13193, 13198 (Feb. 19, 1981) (E.O. 12291 procedures inapplicable if application of same would conflict with statutory or judicial deadlines).

material effects on the suggested dates caused by resource constraints (both funding and personnel). Defendants shall submit with their suggested schedule a report to the court describing any such constraints as well as defendants' actions and requests to remove those constraints.

(d) The schedule shall include no more than 90 days for formal agency review of each regulatory action, including Steering Committee review, Red Border review, and review by the Administrator.

(e) The schedule shall include no additional time to resolve presently unanticipated issues or problems, or to avoid clustering regulatory actions.

(f) The schedule shall reflect defendants' best efforts to resolve all outstanding technical and methodological problems that might materially delay the suggested dates otherwise developed pursuant to conditions (a) through (e); and it is further

ORDERED that for each set of regulations described in paragraphs 31 through 33 of the July 31, 1981 Affidavit of Steven Schatzow (except those regulations excluded pursuant to paragraph 8 of the Decree prior to the date of this Order), defendants shall file with the court and serve on all counsel, on or before June 21, 1982; either: (1) an affidavit justifying an exclusion under paragraph 8 of the Decree; or (2) a suggested schedule for proposing and promulgating the regulation as expeditiously as possible. In developing the most expeditious schedules possible, defendants shall conform their actions to conditions (a) through (f) prescribed in paragraph 3 of this Order.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Nos. 2153-73
75-0172
75-1698
75-1267

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Plaintiffs,

v.

DOUGLAS M. COSTLE, Administrator of the
Environmental Protection Agency, *et al.*,
Defendants.

[Filed March 9, 1979]

MEMORANDUM OPINION

This matter comes before the court on the joint motion of the Natural Resources Defense Council, Inc. ("NRDC") and other named plaintiffs and the defendant Environmental Protection Agency ("EPA") to modify the Settlement Agreement of June 7, 1976 in the above-captioned actions and to modify the court's Final Order and Decree of June 8, 1976 approving the Agreement and directing compliance with its terms and conditions. Also before the court is a joint motion by the intervenor-defendants to vacate the Final Order and Decree. For the reasons set forth below, the court will grant the motion for modification and will deny the motion to vacate. The court's Order accompanying this Memorandum Opinion implements the modified Settlement Agreement between the plaintiffs and defendants.

I.

The plaintiffs brought the four captioned lawsuits to force EPA into more rapid and comprehensive action

under various provisions of the Federal Water Pollution Control Act of 1972 (the "Act" or the "1972 Act"), 33 U.S.C. §§ 1251—1376 (1976). *Natural Resources Defense Council, Inc. v. Train*, Civil Action No. 2153-73, sought an order requiring EPA to expand the list of toxic pollutants which it had published pursuant to Section 307(a)(1) of the Act, *id.* § 1317(a)(1). *Environmental Defense Fund, Inc. v. Train*, Civil Action No. 76-0172, and *Citizens for a Better Environment v. Train*, Civil Action No. 75-1698, sought orders requiring EPA to promulgate effluent standards for those toxic pollutants the agency already had listed pursuant to Section 307(a)(2), *id.* § 1317(a)(2). And *Natural Resources Defense Council, Inc. v. Agee*, Civil Action No. 75-1267, sought an order requiring EPA to promulgate final pretreatment standards pursuant to Section 307(b), *id.* § 1317(b).

In 1976, EPA and the plaintiffs settled these four lawsuits by entering into the Settlement Agreement at issue here. The Agreement established a detailed, comprehensive regulatory program for implementation by EPA of the toxic pollutant control and pretreatment objectives of the Act. In addition to specifying the regulatory mechanisms to be employed by EPA, the Agreement included detailed provisions governing the timing, scope, and nature of EPA's pollution control program. See Settlement Agreement reprinted in *Natural Resources Defense Council, Inc. v. Train*, 8 ERC 2120, 2122-29 (D.D.C. 1976).

The motions now before the court represent the culmination of proceedings that were initiated on September 26, 1978 when the plaintiffs moved the court for an order to show cause why EPA should not be held in contempt of this court for its alleged failure to comply with many of the deadlines set forth in the Settlement Agreement. On October 20, 1978, EPA filed pleadings in opposition to the motion to show cause. Also on October 20, the various industrial, chemical, mining, and utility in-

tervenors ("intervenors") in these consolidated actions filed numerous pleadings arguing that the court should vacate its Final Order and Decree of June 8, 1976 on the ground that subsequent congressional action allegedly had made continuation of the Decree inappropriate. After the parties agreed to a schedule for discovery, briefing, and a hearing, NRDC and EPA began negotiating a settlement to the current controversy between them. On November 28, 1978, EPA held a meeting with the intervenors and announced that it had reached a tentative agreement with NRDC. The intervenors were given ten days to submit written comments regarding the tentative agreement. EPA and NRDC considered the intervenors' written comments and agreed to certain changes based upon the comments. On December 15, 1978, EPA and NRDC filed a joint motion to modify the Settlement Agreement, and withdrew all of their pleadings relating to the motion to show cause. The intervenors, however, declined to withdraw the motions to vacate.

The intervenors advance three, independent grounds that they contend require the court to vacate its Final Order and Decree of June 8, 1976. First, the intervenors argue that Congress clearly intended that the toxic pollutant provisions in the 1977 amendments to the Act, known as the Clean Water Act of 1977, would supersede the toxics program set forth in the Settlement Agreement. Second, they assert that each of the four lawsuits underlying the Agreement is moot and should be dismissed, with the result that court approval of a modified Agreement would constitute "extra-statutory judicial legislation." And, third, the intervenors maintain that modification of the Agreement would violate the public notice-and-comment requirements of the Administrative Procedure Act, the Clean Water Act, EPA's own regulations, and an Executive Order, and would contravene the due process clause of the Fifth Amendment. Further, the intervenors argue that, if the court does approve the

modified Agreement, none of the programmatic undertakings specified therein should constitute enforceable obligations of EPA subject to future enforcement actions.

II.

The intervenors first contend that the court should vacate its Final Order and Decree of June 8, 1976 because the Settlement Agreement has been "supplanted" or "superseded" by the 1977 amendments to the 1972 Act, Pub. L. No. 95-217, 91 Stat. 1566. According to the intervenors, the 1977 amendments provide a comprehensive program to control the discharge of toxic pollutants, and "[n]ow that Congress has amended the statutory structure which gave rise to the Decree, the framework of the Decree should give way to the new statutory plan by Congress."¹ Both EPA and NRDC argue that the amendments ratified the basic structure of the Settlement Agreement and that, inasmuch as the amendments did not exhaustively codify the Agreement, Congress intended that EPA would continue to comply with the terms of the settlement in those areas not modified by the amendments. Upon consideration of the statutory language and the legislative history of the 1977 amendments, the court will deny the motion to vacate on this ground.

In support of their position, the intervenors principally rely upon a statement made by Congressman Roberts regarding the "intent" of the toxic pollutant provisions of the 1977 amendments. Congressman Roberts, who was the Vice Chairman of the House-Senate Conference Committee on the 1977 amendments and the House Floor Manager of the Conference Report, stated to the House of Representatives:

¹ Memorandum in Support of Intervenors' Joint Motion to Vacate the June 8, 1976 Consent Decree and in Response to Plaintiffs' Motion to Show Cause, p. 3.

Crisis-by-crisis reaction to the problem of toxics must no longer be the norm, but replaced by an orderly program for adding compounds to the list, with the Administrator fully in charge. It, therefore, would be entirely appropriate for the United States to petition the courts to relinquish jurisdiction over toxic pollutant control under Public Law 92-500, now that the statutory basis has been laid for a workable regulatory program the lack whereof led to the litigation resulting in the consent decree. This is particularly appropriate in view of the large number of potentially toxic chemicals to be addressed by the program and the need for administrative discretion within the revised regulatory framework to carry out the provisions of law enacted herein.

This is the intent of this legislation, an outgrowth of House initiatives by the House conferees.

123 *Cong. Rec. H.* 12927-12928 (daily ed. Dec. 15, 1977). Noting that the toxic pollutant provisions were drafted in the Conference Committee, and that the Conference Report itself is silent on the effect of the amendments on the Settlement Agreement, the intervenors argue that Congressman Roberts' statement is the surest guide to the congressional intent concerning these provisions.

NRDC assails Congressman Roberts' statement as "unreliable" on a number of grounds that the court finds are without merit. The focus of NRDC's challenge, however, is on the timing of the statement at issue. The intervenors assert that Congressman Roberts made his statement before the House vote adopting the Conference Report. In rebuttal, NRDC has submitted an affidavit of a former EPA official who asserts that he was present during the entire discussion in the House regarding the Conference Report. The affiant states, upon information and belief, that Congressman Roberts addressed the House "certainly no more than five minutes and probably less than that," and that his remarks "did not deal

with much, if any, of the substance of the Conference Report." Freedman Affidavit, ¶¶ 4, 5. NRDC points out that the text of Congressman Roberts' remarks fills nearly 17 pages of the *Congressional Record* and that the statement here in question appears approximately at the halfway point in these remarks. It insists that the statement simply was part of the 17-page text of the Congressman Roberts' remarks, that the statement was not delivered orally on the House floor, that the full text was inserted into the *Record* after the House voted to adopt the Conference Report, and therefore that the statement constitutes an "after-the-fact" attempt to manufacture legislative history.

The court cannot rely upon the type of affidavit testimony proffered by NRDC in its attempt to reconstruct the events preceding adoption of the Conference Report by the House. Even were it to rely upon the affidavit, however, the court could not conclude that the affiant has shed much light on the substance of Congressman Roberts' remarks to the House. The affiant, who is recalling comments made over one year ago, does not state specifically that Congressman Roberts did not make the statement at issue. Indeed, the affidavit does not instruct the court as to what portion, if any, of the Conference Report Congressman Roberts discussed on the floor of the House. The full text of Congressman Roberts' remarks is registered in the *Record* before the tally of the House vote on adoption of the Conference Report, and the court has seen no evidence that would disturb the presumption of regularity that attaches to congressional proceedings such as those at issue here.

It is well settled that courts are to give particular weight to the views of sponsors and floor managers of legislation in determining congressional intent. See *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760*, 377 U.S. 58, 66-67 (1964); *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95

(1954). Yet, contrary to the urging of the intervenors, it does not appear to the court that Congressman Roberts' statement evinces an intent by Congress that the 1977 amendments are automatically to supplant the Settlement Agreement. At most, Congressman Roberts' statement suggests that Congress has left the door open for the executive, which is charged with administering the Act, "to petition the courts to relinquish jurisdiction over toxic pollutant control" 123 *Cong. Rec. H.* 12927-12928 (daily ed. Dec. 15, 1977). In amending other sections of the 1972 Act, Congress demonstrated that it could speak clearly in dealing with judicial judgments it wished to repudiate.² The instant action does not present a comparable case of express congressional disapproval. As intervenors acknowledge, the Conference Report is silent on the issue of the effect of the amendments on the 1976 Agreement. Moreover, there is nothing in the remarks to the Senate by Senator Muskie, who was the Senate Floor Manager of the Conference Report, to support the construction of the amendments advanced by the intervenors. *See id.* S. 19636-19657.³ The court finds such silence significant in view of the fact that the Congress had the Settlement Agreement before it when it enacted the toxic pollutant provisions of the 1977 amendments, and that, in Senator Muskie's words, "[t]he

² *See, e.g.*, S. Rep. No. 370, 95th Cong., 1st Sess. 68 (1977) (authors of amendments to Sections 313 and 404 of the Act explicitly rejected the holding in *Minnesota v. Hoffman*, 543 F.2d 1198 (8th Cir. 1976); *id.* at 60 (Senate Report discussion of the new provision for compliance orders under Section 309 of the 1972 Act repudiated the holding in *Republic Steel Corp. v. Train*, 557 F.2d 91 (6th Cir. 1977)).

³ The intervenors argue that Senator Muskie's comments are entitled to less weight than those of Congressman Roberts, because Senator Muskie was prevented by ill health from attending the conference. In his remarks to the Senate, however, Senator Muskie stated that he "undertook to follow developments in the conference." 123 *Cong. Rec. S.* 19636 (daily ed. Dec. 15, 1977).

conference agreement was specifically designed to codify the so-called 'Flannery decision,'" *Id.* S. 19647.

In the court's view, the 1977 amendments themselves do not imply an intention to supplant the Settlement Agreement. The revised Act's departures from the terms of the Agreement, most notably in the amendment providing for additions and deletions from the statutory toxics list, 33 U.S.C.A. § 1317(a)(1) (1978), and in the amendment giving EPA added time to promulgate its best-available-technology regulations, *id.* § 1317(a)(2), do not constitute a congressional rejection of the 1976 settlement or create a new program for regulating toxic pollutant discharges. Rather, they build on that settlement and attempt to conform the statute to the reality of EPA's program. The intervenors argue that Congress indicated its intention to supplant the settlement as much by what it did not do in 1977 as by what it did. The 1977 amendments did not address several important aspects of the toxic pollutant control program worked out in 1976, including the development of pretreatment standards for 21 industries, 65 toxic pollutants, and other incompatible pollutants (paragraphs 3, 4, and 13 of the Agreement) and the establishment of more stringent control requirements (paragraph 12 of the Agreement). The intervenors interpret these omissions as an expression by Congress of its intent that EPA no longer was to be bound by any provisions of the Agreement that were not specifically incorporated into the amendments. In view of Congress's general endorsement of the approach of the Agreement, a more plausible inference to be drawn from congressional inaction in these areas is that Congress intended for the Agreement to remain in effect to supply the missing details of a cohesive strategy for controlling toxic water pollution. Therefore, the motion to vacate is not supported by necessary implication arising from the 1977 amendments.⁴

⁴ The intervenors rely heavily upon the Supreme Court's decision in *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), to

III.

The intervenors next contend that the court lacks jurisdiction to approve the proposed modification because the four causes of action underlying the Settlement Agreement have become moot. They assert that the "toxic pollutant effluent standards cases," Civil Action Nos. 75-0172 and 75-1698, and the "toxic pollutant list case,"

support their contention that due to the changes in the 1972 Act the court should vacate this decree. In *Wright*, nonunion employees of a railroad brought suit against the railroad and certain unions of its employees, alleging that the defendants had breached the Railway Labor Act, which prohibited union-shop agreements between railroads and labor unions. The parties entered into a consent decree forbidding the defendants to discriminate against nonunion employees because of their refusal to join unions. After the Act was amended in 1951 to permit union-shop agreements between railroads and labor unions, the unions moved that the decree be modified so as not to prohibit the defendants from entering into such agreements. The District Court, which had retained jurisdiction of the suit, denied the motion. The Supreme Court reversed, declaring that it was an abuse of discretion to deny modification of the injunction. Speaking for the Court, Justice Harlan observed that "the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." *Id.* at 651. Therefore,

just as the adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives, so must it be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives. . . . The court must be free to continue to further the objectives of that Act when its provisions are amended.

Id.

The principle enunciated in *Wright* will not be contravened by approval of the joint modification in the present case, because the modification furthers, rather than conflicts with, the objectives of the 1972 Act, as amended. The only clear instance of congressional intent to alter the Decree's requirements is the extension of the deadline for compliance with best-available-technology effluent limitations from July 1, 1983, the date in the 1972 Act, to July 1, 1984. The joint modification would conform the Decree to this amendment.

Civil Action No. 2153-73, are moot because the 1977 amendments changed the statute in such a way as to remove the controversies raised by those actions. With respect to the plaintiffs' "pretreatment case," Civil Action No. 75-1267, the intervenors argue that EPA's actions pursuant to paragraph 13 of the Agreement fully satisfy the complaint, thereby eliminating the controversy raised by that suit. The court is not convinced either that all of the controversies underlying the 1976 settlement have been extinguished or that it lacks jurisdiction under the mootness doctrine to approve all aspects of the proposed modification.

NRDC concedes that the 1977 amendments repealing both the requirement for toxic pollutant effluent standards and the six-month deadlines for promulgating final toxic pollutant effluent standards under Section 307(a) (2) of the 1972 Act, 33 U.S.C. § 1317(a) (2) (1976), effectively removed the basis for the plaintiffs' claims in Civil Action Nos. 75-0172 and 75-1698. The repeal of Section 307(a) (1) of the 1972 Act, *id.* § 1317(a) (1), and its replacement by a new Section 307(a) (1), 33 U.S.C.A. § 1317(a) (1) (1978), however, did not similarly affect the plaintiffs' claim in Civil Action No. 2153-73. In that case, the plaintiffs contended, first, that EPA had developed its list of toxic pollutants by using selection criteria that were not specified in Section 307(a) (1) and that improperly limited the list and, second, that EPA unlawfully had failed to list 25 additional substances. The intervenors argue that no controversy survives with respect to these allegations, because Congress in 1977 replaced EPA's former, non-discretionary duty to list pollutants with a basic list of 65 pollutants and with broad discretion for the Administrator to add pollutants to, or remove pollutants from, that basic list. Yet, Congress left unchanged the statutory factors against which the plaintiffs had compared EPA's selection criteria. To date, EPA has not renounced the allegedly arbitrary and unauthorized criteria it used, nor has it published re-

vised selection criteria. Because the plaintiffs in the toxic list case requested such relief, that case, even under the intervenors' application of mootness principles, is not moot.⁵

Although Congress did not amend any of the statutory provisions underlying the complaint in the pretreatment case, the intervenors maintain that EPA's actions under paragraph 13 of the Agreement satisfy that complaint. NRDC does not contest the fact that EPA has discharged its obligations pursuant to paragraph 13 to issue pretreatment standards regulations for eight industry categories by May 15, 1977. Rather, NRDC strenuously disputes the intervenors' contention that the plaintiffs restricted their original request for relief to specific pollutants or chemical classes of pollutants and that paragraph 13 contains the only obligations EPA undertook in exchange for NRDC's agreement not to litigate the pretreatment action. As to the first contention, NRDC points out that the complaint broadly alleged violations and requested relief pertaining to "all pollutants which are determined not to be susceptible to treatment by [publicly owned treatment works] or which would interfere with the operation of such works." Complaint in Civil Action No. 75-1267, p. 18. Moreover, the plaintiffs listed 37 point source categories as specifically subject to

⁵ Even if EPA were to renounce its selection criteria, the list case would not be moot if the court were to determine that there was a sufficient threat of repetition of the allegedly illegal action by the agency. See, e.g., *United States v. Concentrated Phosphate Export Association, Inc.*, 393 U.S. 199, 203 (1968). NRDC also claims that the list case is not moot because seven of the pollutants it named in the original complaint are not on the list that was published pursuant to the new Section 307(a)(1). The intervenors state that they can identify only four pollutants that are not on the list and argue that, because Congress chose to exclude the four pollutants, NRDC can have no continuing complaint or rights against EPA. The court cannot resolve the factual discrepancy regarding the number of omitted pollutants on the basis of the pleadings and need not reach the question to hold that the list case is not moot.

their complaint and listed nine additional categories for which proposed standards had not been published. The court agrees with NRDC that the plaintiffs did not exchange their rights to pursue the broad allegations of the pretreatment complaint in return for EPA's agreement to regulate eight industries. A fair reading of the comprehensive, interrelated Agreement yields the conclusion that paragraphs 3, 4 and 7 must be seen as closely related to, and in settlement of, plaintiffs' pretreatment suit. Because not all of the provisions in those paragraphs have been satisfied by EPA, even under the intervenors' theory the pretreatment case is not moot.

Even assuming that the toxic pollutant effluent standards cases are moot,* the court cannot conclude that, because two of the controversies underlying the 1976 settlement have been eliminated by statutory developments, the court lacks jurisdiction to approve the joint modification in its entirety. The court agrees with NRDC that the four original causes of action have become inseparable as a result of the settlement. The Agreement

* The intervenors base their mootness attack on the toxic pollutant effluent standards cases and on the toxic pollutant list case upon the principle that a case is moot when the controlling statute has been amended to eliminate the controversy between the parties. The instant case, however, does not present the usual situation where statutory changes have destroyed the justiciability of a suit previously suitable for adjudication. The cases cited by the intervenors, e.g., *Kremens v. Bartley*, 431 U.S. 119 (1977) and *Hall v. Beals*, 396 U.S. 45 (1969), addressed the question of a court's jurisdiction to enforce a cause of action where some statutory development has deprived the court of its ability to provide any presently meaningful remedy. The Supreme Court in those cases held that an action is moot where a statute had been changed in such a way as to give the plaintiff the relief originally requested. NRDC argues that, inasmuch as the pending motion to modify the Decree merely amounts to a settlement of the plaintiffs' attempt to enforce relief already granted, the authorities cited above are not applicable. Because the court concludes that two of the four original controversies survive under the intervenors' theory, it need not reach the question of the legal soundness of that theory.

represents a comprehensive, interrelated package of concessions made by EPA in return for the plaintiffs' agreement not to pursue the claims raised in the four lawsuits. Because it was the settlement as a whole that represented an acceptable bargain to both sides, it cannot be said that each portion of the Agreement is specifically responsive to a particular claim contained in one or more of the original complaints. It would do violence to the settlement for the court to attempt to separate aspects of the Agreement that rest on the arguably moot causes of action from those that do not. The intervenors nowhere have suggested that the two causes of action as to which controversies still survive would not alone have provided a substantial basis for the settlement approved by the court in 1976. Therefore, the intervenors' mootness challenge must fail.

IV.

The intervenors argue vigorously that the proposed modification imposes substantial new burdens and obligations upon both EPA and the industries regulated by EPA. Because agency action in modifying the Agreement will have a significant impact upon the regulated parties, contend the intervenors, EPA must provide notice and an opportunity for public comment before taking such action. The intervenors assert that implementation of the modified settlement without public commentary would violate both the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.* (1976), and the due process clause of the Fifth Amendment. The court disagrees with both the intervenors' characterization of the significance of the proposed modification and with the contention that EPA has not satisfied requirements imposed upon it by the APA and the Constitution.

Contrary to the contention of the intervenors, the proposed modification does not commit EPA to major new programmatic initiatives not covered by the original Agreement. The joint modification contains four sub-

stantive changes. First, it extends the deadlines for the proposal and promulgation of technology-based effluent limitations, standards of performance, and pretreatment standards under paragraphs 1, 2, 3, and 7 of the Agreement, as well as the deadlines for the publication of water quality criteria pursuant to paragraph 11. Second, it broadens paragraph 8 of the Agreement, which allows EPA to exclude certain pollutants from regulation, to exclude not merely pollutants but entire categories and subcategories from regulation when EPA determines that their environmental significance does not warrant promulgation in accordance with the schedule contained in the Agreement. Third, it provides EPA with additional time and flexibility to develop pretreatment standards for incompatible pollutants beyond the 65 pollutants specifically mentioned in the Agreement. And, fourth, the proposed modification clarifies paragraph 12 of the Agreement by specifying in more detail the investigatory steps EPA must take to determine when and if effluent limitations more stringent than the technology-based limitations pursuant to paragraphs 1, 2, 3 and 7 of the Agreement are necessary to protect aquatic life or human health.

To buttress their contention that EPA has agreed to a new extensive regulatory program, the intervenors point specifically to the new paragraph 4(c). That paragraph requires EPA to investigate incompatible pollutants in addition to the 65 pollutants covered explicitly by the Agreement. The court cannot agree with the intervenors that paragraph 4(c) calls for EPA to assume major additional programmatic responsibilities under the Agreement. It commits EPA only to investigate an unspecified number of incompatible pollutants, within its discretion, and gives EPA discretion to exclude pollutants as it pursues its investigatory program.

Even if the court were to accept the intervenors' characterization of the significance of the proposed modifica-

tion, it could not conclude that EPA has breached obligations imposed upon it by the APA. The intervenors argue that the modification is a "rule" within the meaning of Section 551(4) of the APA, 5 U.S.C. § 551(4) (1976), and therefore that the modification process is subject to the rulemaking requirements of the APA, which call for publication of notice of the proposed rule and provision to interested persons of an opportunity to comment. *Id.* § 553. The APA defines "rule" to mean

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency

Id. § 551(4). The United States Court of Appeals for the District of Columbia Circuit has observed that "[t]his broad definition obviously could be read literally to encompass virtually any utterance by an agency. . . ." *Pacific Gas & Electric Co. v. FPC*, 164 U.S. App. D.C. 371, 375, 506 F.2d 33, 37 (1974). This court does not believe that Congress intended the definition of "rule" to reach modification of judicial settlements such as that in the present case. The intervenors have cited no decision by any court holding that an action as preliminary to the regulatory process as that at issue here constitutes rulemaking. In rejecting a similar challenge made by the intervenors to the original Agreement, the court noted that "[t]he agreement merely requires the EPA to initiate rulemaking proceedings for the pollutants and industries listed in the appendices." *Natural Resources Defense Council, Inc. v. Train*, *supra*, 8 ERC at 2121-22. See also *In Re Corporate Patterns Report Litigation*, 432 F. Supp. 291, 302 (D.D.C. 1977). The proposed modification does not change the fundamental character of the Agreement. When EPA undertakes rulemaking under the deadlines set forth in the Agreement, the intervenors and the public will be entitled to receive notice

of the proposed rules and will have full opportunity to comment.⁷

The court finds little merit in the suggestion by the intervenors that implementation of the joint modification would violate due process rights secured by the Constitution. The intervenors have cited several cases in which courts have required that effective prior notice be given to those parties affected by a proposed decree in the context of a settlement agreement. *See, e.g., Cunningham v. English*, 106 U.S. App. D.C. 92, 269 F.2d 539, *cert. denied*, 361 U.S. 905 (1959). In the present case, however, the effect of the settlement upon the intervenors is not similarly direct or immediate, and the court must conclude that those parties have not been denied the process which is constitutionally due them.⁸

⁷ The intervenors also claim that notice-and-comment rulemaking is required because these procedures are followed by the Department of Justice in approving antitrust consent judgments. The Justice Department's practice, however, is mandated by statute. 15 U.S.C. § 16(b) (1976). Moreover, as EPA points out, settlements in the antitrust area have direct, immediate, and substantial effect upon the parties and the public, unlike the preliminary actions authorized by the Settlement Agreement in this case.

⁸ The court finds without merit the intervenors' further contention that the negotiations between NRDC and EPA leading to the joint modification contravened the notice-and-comment requirement set forth in Section 101(e) of the Clean Water Act, 33 U.S.C.A. § 1251(e) (1978), and its implementing regulations, 40 C.F.R. Part 105. The proposed modification does not constitute "any regulation, standard, effluent limitation, plan, or program" within the compass of Section 101(e). Further, the court is unpersuaded that EPA's actions in agreeing to the proposed modification failed to comply with the requirements of Executive Order No. 12044, 43 Fed. Reg. 12661 (March 24, 1978). That Order requires regulatory agencies to provide an opportunity for public participation in the development of "significant regulations." *Id.* at 12662. The intervenors concede that the draft modification itself does not establish regulations, but apparently argue that, insofar as the proposed modification obligates EPA to follow specified procedures in developing regulations, the public participation requirements of the Order apply

V.

Finally, the intervenors suggest that, if the court approves the proposed modification to the Settlement Agreement, it should include an "explanatory" provision expressly limiting its enforcement authority to certain portions of the Decree. The clause proposed by the intervenors would provide that no parts of the Agreement other than those relating to the deadlines for carrying out various programs would be enforceable by contempt or otherwise in subsequent proceedings, and that EPA's compliance with the deadlines will be judged against the good-faith standard articulated by the court in its May 26, 1976 letter to the parties and its opinion accompanying entry of the Final Order and Decree of June 8, 1976, *see Natural Resources Defense Council, Inc. v. Train, supra*, 8 ERC at 2121. The intervenors argue that such a provision would comport with the court's previously expressed "special concern" not to become "involved in the affairs of the EPA" by "review[ing] substantive judgments made by the Administrator of the EPA." *Id.* Moreover, the intervenors point out that this "clarification" of the court's limited role would prevent repetition of the "disruptive, expensive and time-consuming proceedings" that have followed in the wake of the filing of the plaintiff's show cause motion.

The court is unpersuaded that it should curtail its authority to supervise and enforce its own Decree. In its decision accompanying entry of the Decree, the court distinguished between the requirement in the original settlement proposal that the court exercise oversight regarding technical matters, which the court said it felt was inappropriate, and the requirement that the court enforce compliance with the terms and conditions of the

to the agency's actions. This extension of the public comment requirement urged by the intervenors has no warrant in the language of the Order and, in the court's view, is not necessarily inferable from it.

Agreement, which the court recognized called for a function "regularly perform[ed] by courts." *Id.* The proposed modifications to the Settlement Agreement do not seek to expand the court's supervisory role beyond the boundaries established when the court approved the original Agreement. Avoidance of the costs associated with the conduct of contempt proceedings clearly is not a sufficient reason for the court to limit even further its role in overseeing implementation of the settlement in these cases.

An appropriate Order accompanies this Memorandum Opinion.

/s/ Thomas A. Flannery
United States District Judge

Dated: 3-9-79

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Nos. 2153-73
75-0172
75-1698
75-1267

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Plaintiffs,

v.

DOUGLAS M. COSTLE, Administrator of the
Environmental Protection Agency, *et al.*,
Defendants.

[Filed March 9, 1979]

ORDER

Upon consideration of the Joint Motion for Modification of Settlement Agreement and Court's Order and Intervenor's Joint Motion to Vacate and the memoranda of counsel submitted in connection therewith and in opposition thereto, and the court having heard the oral argument of counsel, and for the reasons set forth in the court's Memorandum Opinion filed this day, it is, by the court, this 9th day of March, 1979,

ORDERED that the Joint Motion for Modification of Settlement Agreement and Court's Order be, and the same hereby is, granted; and it is further

ORDERED that Intervenor's Joint Motion to Vacate be, and the same hereby is, denied; and it is further

ORDERED that the attached modification of the Settlement Agreement is approved.

/s/ Thomas A. Flannery
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Nos. 2153-73

75-0172

75-1698

75-1267

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Plaintiffs,

v.

DOUGLAS M. COSTLE, Administrator of the
Environmental Protection Agency, *et al.*,
Defendants

[Filed March 9, 1979]

MODIFICATION OF SETTLEMENT
AGREEMENT AND COURT'S ORDER

Plaintiffs (Natural Resources Defense Council, Environmental Defense Fund, Citizens for a Better Environment, National Audubon Society, and Businessmen for the Public Interest) and defendants (the Environmental Protection Agency) hereby agree to modify the Settlement Agreement between the parties dated June 7, 1976 and filed with this Court; and to modify the Court's Final Order and Decree of June 8, 1976, as follows:

1. That the date contained in Paragraph 1 of the Agreement, "June 30, 1983" be deleted and replaced by the date "June 30, 1984."
2. That the following words in Paragraph 4(a) be deleted:

"and (ii) to such other pollutants which are introduced into such treatment works and which are not susceptible to treatment by such treatments works or which interfere with, pass through, or are otherwise incompatible with such works;"

and replaced as follows:

"and (ii) to such other pollutants known to the agency which are introduced into such treatment works and which are not susceptible to treatment by such treatment works or which interfere with, pass through, or are otherwise incompatible with such works, and which either pose significant threats to the operation of such treatment works or to water quality or public health as a result of being incompatible with such treatment works, or are traditional pollutants of concern in the specific industry category."

3. That a new paragraph 4(c) be added as follows:

"4(c) The Administrator shall establish and implement a program to identify and study other pollutants which are introduced into such treatment works and which are not susceptible to treatment by such works or which interfere with, pass through, or are otherwise incompatible with such works. The program shall, at a minimum, address those pollutants listed in Appendix C identifiable by computer-based mass spectra search programs ("computer matching"), and shall consist of steps to: tentatively identify by computer matching pollutants discharged by point source categories listed in Appendix B; determine frequencies of occurrence and order-of-magnitude concentrations for the tentatively identified pollutants; analytically confirm the computer identification of those pollutants found with significant frequency in at least one subcategory and in high concentrations (the term "high" to be based on comparison with the concentrations of other pollutants found or known to be in the discharge and, where possible, on readily available information with respect to toxicity of the pollutants); determine for these pollutants analytically confirmed, based upon a comprehensive literature search of the latest scientific knowl-

edge, the kind and extent of all identifiable effects on aquatic organisms and human health; develop from the above information a list of pollutants that are candidates for national regulation; determine, by molecular structure analysis and/or laboratory appropriate means where practicable, both the probable compatibility of the listed pollutants with treatment works (as defined in Section 212 of the Act) which are publicly owned, and the probable extent to which industrial technology designed to remove pollutants included in Appendix A also will remove listed pollutants. The Administrator may remove pollutants from said pollutant candidate list that he deems to be compatible with publicly owned treatment works or effectively controlled by industrial technology upon which pretreatment standards promulgated pursuant to § 307(b) of the Act are based, or are present in only trace amounts and are neither causing nor likely to cause toxic effects. The Agency shall complete this program by July 1, 1983. Immediately thereafter, the Administrator shall undertake regulatory action for those pollutants remaining on the list."

4. That Paragraph 7(b) be deleted, and replaced as follows:

"7(b). The regulations required to be developed under this Agreement for each category shall be proposed and promulgated pursuant to the following schedule:

Industry	Proposal * Date	Promulgation * Date
Adhesives	2/1/80	8/29/80
Leather Tanning and Finishing	1/12/79	8/10/79
Soaps & Detergents	7/18/80	1/30/81
Aluminum Forming	3/21/80	10/17/80
Battery Manufacturing	3/23/80	10/24/80
Coil Coating	8/14/79	3/21/80
Copper Forming	4/11/80	11/7/80
Electroplating	3/21/80	10/17/80
Foundries	10/26/79	5/23/80

Industry	Proposal * Date	Promulgation * Date
Iron & Steel	11/2/79	5/30/80
Nonferrous Metals	8/24/79	3/21/80
Photographic Supplies	2/1/80	8/29/80
Plastics Processing	10/10/80	5/8/81
Porcelain Enamel	10/12/79	5/9/80
Gum & Wood Chemicals	8/31/79	3/28/80
Paint & Ink	9/21/79	4/18/80
Printing & Publishing	11/16/79	6/13/80
Pulp & Paper	2/1/80	8/29/80
Textile Mills	5/18/79	12/14/79
Timber	5/11/79	12/7/79
Coal Mining	12/14/79	6/20/80
Ore Mining	11/23/79	7/5/80
Petroleum Refining	3/16/79	10/2/79
Steam Electric	5/24/79	12/20/79
Organic Chemicals	1/11/80	8/18/80
Pesticides	3/21/80	10/17/80
Pharmaceuticals	12/2/79	7/18/80
Plastic & Synthetic Materials	1/25/80	8/22/80
Rubber	6/23/79	1/12/80
Auto & Other Laundries	12/7/79	7/4/80
Mechanical Products	8/15/80	3/13/81
Electric & Electronic Components	3/14/80	10/10/80
Explosives Manufacturing	12/21/79	7/18/80
Inorganic Chemicals	9/21/79	4/18/80

* Signature Date"

5. That paragraph 8 of the Agreement be deleted and replaced as follows:

"8(a) The Administrator may exclude from regulation under the effluent limitations and guidelines, standards of performance, and/or pretreatment standards contemplated by this Agreement a specific pollutant or category or subcategory of point sources for any of the following reasons, based upon information available to him:

(i) For a specific pollutant or a subcategory or category, equally or more stringent protection is already provided by an effluent, new source performance, or pretreatment standard or by an effluent limitation and guideline promulgated pursuant to Section(s) 301, 304, 306, 307(a), 307(b) or 307(e) of the Act;

(ii) For a specific pollutant, except for pretreatment standards, the specific pollutant is present in the effluent discharge solely as a result of its presence in intake waters taken from the same body of water into which it is discharged and, for pretreatment standards, the specific pollutant is present in the effluent which is introduced into treatment works (as defined in Section 212 of the Act) which are publicly owned solely as a result of its presence in the point source's intake waters, *provided* however, that such point source may be subject to an appropriate effluent limitation for such pollutant pursuant to the requirements of Section 307;

(iii) For a specific pollutant, the pollutant is not detectable (with the use of analytical methods approved pursuant to 304(h) of the Act, or in instances where approved methods do not exist, with the use of analytical methods which represent state-of-the-art capability) in the direct discharges or in the effluents which are introduced into publicly-owned treatment works from sources within the subcategory or category; or is detectable in the effluents which are introduced into publicly-owned treatment works from sources within the subcategory or category; or is detectable in the effluent from only a small number of sources within the subcategory and the pollutant is uniquely related to only these sources; or the pollutant is present only in trace amounts and is neither causing nor likely to cause toxic effects; or is present in amounts too small to be effectively reduced by technologies known to the Administrator; or the pollutant will be effectively controlled by the technologies upon which are based other effluent limitations and guidelines, standards of performance, or pretreatment standards; or

(iv) For a category or subcategory, the amount and the toxicity of each pollutant in the discharge does

not justify developing national regulations in accordance with the schedule contained in Paragraph 7(b).

(b) The Administrator may exclude from regulation under the pretreatment standards contemplated by this Agreement all point sources within a point source category or point source subcategory:

(i) if 95 percent or more of all point sources in the point source category or subcategory introduce into treatment works (as defined in Section 212 of the Act) which are publicly owned only pollutants which are susceptible to treatment by such treatment works and which do not interfere with, do not pass through, or are not otherwise incompatible with such treatment works; or

(ii) if the toxicity and amount of the incompatible pollutants (taken together) introduced by such point sources into treatment works (as defined in Section 212 of the Act) that are publicly owned is so insignificant as not to justify developing a pretreatment regulation in accordance with the schedules set out in paragraphs 7 and 13 of this Agreement.

(c) Whenever the Administrator decides to exclude a point source category or a specific pollutant from coverage pursuant to this section of this Agreement, he shall promptly serve upon the parties to the captioned cases, or their designated representative or attorney, a statement under oath designating the point source category or subcategory or specific pollutant to be excluded together with the reasons therefore. Such statement shall detail the reasons for the Administrator's exclusion, and shall set forth the data and information forming the basis for the exclusion. Proposed regulations for each point source category or subcategory shall identify each such exclusion, shall summarize the Administrator's statement, and shall invite public comments on such exclusion.

(d) The Agency shall submit statements as required by Paragraph 8(c) for all categories, subcategories or specific pollutants with respect to which the Agency has already curtailed studies required by Paragraph 7(a) or any other necessary studies, no later than January 31, 1979. After January 31, 1979, the Agency shall submit statements as required by Paragraph 8(c) as soon as possible after the Agency has made a decision to curtail, or not to initiate studies required by the Agreement.

(e) The authority of the Administrator pursuant to this paragraph may be delegated to the Assistant Administrator for Water and Waste Management."

6. That Paragraph 10(b) be modified by replacing the date of "June 30, 1983" with the date of "June 30, 1984."

7. That Paragraph 11 of the Agreement be deleted and replaced by the following:

"The Administrator shall publish, under Section 304 (a) of the Act, water quality criteria accurately reflecting the latest scientific knowledge on the kind and extent of all identifiable effects on aquatic organisms and human health of each of the pollutants listed in Appendix A. Such water quality criteria shall state, *inter alia*, for each of the pollutants listed in Appendix A, the recommended maximum permissible concentrations (including where appropriate zero) consistent with the protection of aquatic organisms, human health and recreational activities. Such water quality criteria shall be proposed and published pursuant to the following schedule:

	Published for Public Comment *	Final Publication *
I. 29 pollutants	3/1/79	8/31/79
II. 36 pollutants	7/1/79	12/31/79

* Signature Date"

8. That Paragraph 12 be deleted and replaced as follows:

"12(a) Whenever in the judgment of the Administrator the discharge of any pollutant listed in Appendix A by a point source or group of point sources would, with application of effluent limitations, guidelines and standards otherwise mandated under this Agreement, interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife and allow recreational activities in and on the water, the Administrator shall forthwith establish more stringent effluent limitations, guidelines, standards (including alternative effluent control strategies) or other necessary controls for such point source or sources pursuant to his authority under Sections 302, 301/303 or 307(a), or under any other authority available to the Administrator.

12(b) Not later than June 30, 1978, the Administrator shall establish a specific and substantial program with the objective and capability of determining whether more stringent effluent limitations, guidelines and standards or other controls are necessary under this Paragraph 12. In order to have the objective and capability of making such determinations, the specific and substantial program required by this paragraph shall include:

(i) a process for identifying, after surveying a substantial number of portions of the navigable waters, those portions that are seriously contaminated by discharges of toxic pollutants listed in Appendix A, as well as the presence and amounts of specific pollutants and their sources that are causing such contamination, with respect to which more stringent

limitations, guidelines, standards or other controls may be necessary;

(ii) a process for identifying those toxic pollutants listed in Appendix A, with respect to which more stringent limitations, guidelines and standards may be necessary on a nationwide or other broad geographical basis; and

(iii) a process that is consistent with the objectives and requirements of subparagraph (a) for developing and implementing necessary strategies, under the Act or any other authority available to the Administrator, for reducing or eliminating discharges of toxic pollutants, either in specific portions of the navigable waters as identified pursuant to subparagraph (b) (i), or on a nationwide or other broad geographical basis for any pollutants identified pursuant to subparagraph (b) (ii).

12(c) The Administrator shall complete the identifications under subparagraphs (b) (i) and (b) (ii) no later than July 1, 1981. Not later than December 31, 1981, the Administrator shall publish the Agency's strategies for reducing or eliminating discharges of toxic pollutants in those portions of the navigable waters, and/or with respect to those pollutants, that have been identified pursuant to subparagraphs (b) (i) and (b) (ii). Each such strategy shall, at a minimum, identify the statutory and regulatory authorities or mechanisms that shall be utilized by the Agency, and include an estimated schedule for implementation."

9. That a new Paragraph 19 be added as follows:

"19. Nothing herein shall be construed to limit the Administrator's right to exercise any statutory authority he may have at any time or, as between the parties, to affect his obligation to perform any non-discretionary duty not specifically covered by this agreement."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2153-73

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Plaintiffs,

v.

RUSSELL E. TRAIN,
Defendant.

Civil Action No. 75-172

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Plaintiffs,

v.

RUSSELL E. TRAIN,
Defendant.

Civil Action No. 75-1698

CITIZENS FOR A BETTER ENVIRONMENT, *et al.*,
Plaintiffs,

v.

RUSSELL E. TRAIN,
Defendant.

Civil Action No. 75-1267

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Plaintiff,

v.

JAMES I. AGEE, *et al.*,
Defendants.

[Filed June 9, 1976]

MEMORANDUM

The court is today filing an order implementing a settlement agreement between the plaintiffs and defendants in the four above-captioned cases. Several parties permitted to intervene in one of the cases vehemently oppose the settlement, as do numerous other parties who, pursuant to invitation by the court, filed memoranda expressing their views.¹ One intervenor, the National Coal Association, supports the settlement agreement. The court finds that the objections to the settlement raised by the intervenors either misconstrue the nature of the action taken by the court today or misinterpret the applicable law.

The four cases brought to a conclusion by the settlement agreement all concern the regulation of toxic discharges into American waterways. Civil Action No. 2153-73 seeks an order requiring the Environmental Protection Agency (EPA) to expand the list of toxic pollutants promulgated pursuant to section 307 of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1317 (Supp. IV, 1974). Civil Action Nos. 75-172 and 75-1698 seek an order requiring the EPA to promulgate regulations for the toxic pollutants already listed pursuant to section 307. Civil Action No. 75-1267 seeks an order requiring the EPA to promulgate final pretreatment standards pursuant to section 307.

The plaintiffs and defendants in all four cases have submitted to the court a proposed settlement agreement obligating the EPA to promulgate a series of regulations under sections 301, 304, and 306 of the Act, 33 U.S.C. §§ 1311, 1313, 1316 (Supp. IV, 1974), in addition to sec-

¹ The intervenors in Civil Action No. 75-172 were permitted to enter the case by order of Judge Joseph C. Waddy. For the reasons stated in the Memorandum accompanying the order of April 29, 1976, denying all motions to intervene in the above-captioned cases, the court finds that Judge Waddy permitted intervention under Rule 24(b) of the Federal Rules of Civil Procedure. See Order of April 29, 1976, accompanying memorandum at 7.

tion 307. In explaining the proposed settlement to the court, counsel for the EPA stated that sections 301, 304 and 306 were considered superior to section 307 because they allow regulated parties three years to comply with pollution standards rather than one year, because they allow industry-wide regulation rather than pollutant-by-pollutant regulation, thereby enabling regulated parties to predict the entire cost of pollution control, and because they allow consideration of cost and technology in determining the level of regulation. See Hearing of March 31, 1976, Tr. at 8-9.

Intervenors, who will almost certainly be affected by regulations promulgated pursuant to the settlement agreement, immediately opposed entry of a decree adopting the settlement. By order of April 5, 1976, the court permitted the intervenors and any other interested persons to file comments on the proposed settlement. Approximately 20 memoranda were filed in opposition to the agreement. Several of the parties submitting comments on the settlement also filed motions for intervention, but these were denied by the court in an order of April 29, 1976.

Following consideration of the proposed agreement and the comments, the court found certain modifications to be necessary. Of special concern was the degree to which the agreement required the court to become involved in the affairs of the EPA. As recently modified by the parties, the agreement is now subject to an interpretation which results in an acceptable role for the court. Specifically, the court will not review substantive judgments made by the Administrator of the EPA as the original agreement appeared to require, but will merely ensure good faith compliance with the provisions of the agreement.³

³ The court's interpretation of the agreement, especially paragraph 8(c), is spelled out in a letter sent to the parties on May 28, 1976. The parties' concurrence in this interpretation is found in letters sent to the court on June 7, 1976. All three letters are part of the records in each of the four cases.

It is possible that even this limited role will require a substantial investment of judicial resources. The key difference between the modified agreement and the original, however, is that this is a proper burden for the court to bear. Courts regularly perform this type of enforcement function. *See, e.g., N.R.D.C., Inc. v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), *aff'd* 527 F.2d 1386 (D.C. Cir. 1976); *N.R.D.C., Inc. v. Train*, Civil Action No. 1609-73 (D.D.C.); *E.D.F. v. Fri*, Civil Action No. 849-73 (D.D.C.). Indeed, had the four cases continued to judgment and plaintiffs prevailed, the court would have assumed an enforcement role quite similar to that imposed by the settlement agreement.

Intervenors raise several objections to the agreement. First, they fear that they will not be able to challenge either the content or general legality of regulations issued in accordance with the agreement. It is fairly clear that this fear is groundless. The court certainly cannot be approving the content of regulations which do not yet exist. The intervenors will have opportunity to influence the content of regulations by participating in the rule-making proceedings the EPA must conduct before promulgation and will have opportunity to attack the final regulations in the Court of Appeals. The intervenors will also be able to question the general legality of the regulations. It is possible that the regulation of pollutants according to their toxicity is limited to section 307 as intervenors contend, but the court need not resolve this issue in order to approve the agreement. Indeed, the court could not resolve the issue at this time because, until regulations are promulgated, there is not a concrete controversy. The Act, on its face, grants the EPA such broad regulatory powers under sections 301, 304, and 306, that the court can approve the general plan outlined in the agreement. As noted in the memorandum accompanying the order denying intervention, approval of the agreement creates no precedent on the legality of the specific regulations

which may emerge. Order of April 29, 1976, accompanying memorandum at 4-5; *see S.E.C. v. Canadian Javelin Ltd.*, 64 F.R.D. 648, 650 (S.D.N.Y. 1974); *United States v. Carter, Products, Inc.*, 211 F. Supp. 144, 148 (S.D.N.Y. 1962).

The second claim of the intervenors is that the agreement must be considered rulemaking to the extent it decides which pollutants and which industries are to be regulated. Intervenors are correct in asserting that the rulemaking process consists of two phases, pollutant selection and impact evaluation, but are incorrect in asserting that the settlement agreement forecloses their participation in the first phase. The agreement merely requires the EPA to initiate rulemaking proceedings for the pollutants and industries listed in the appendices. One function of these proceedings will be to determine the necessity of promulgating regulations for the pollutant or point source in question, and paragraph eight of the settlement agreement expressly provides that the EPA may delete pollutants or point sources when, in its discretion, regulation would not be necessary.³

The intervenors finally contend that there is no jurisdiction for entering a decree implementing the proposed settlement because it extends beyond the case or controversy created by the complaints filed in the four cases. This position does not withstand careful analysis. First, these actions were not merely "section 307 suits", but suits designed to force the regulation of toxic pollutants. There is no doubt that the decree deals with this subject. Second, defendants opposed the complaints by arguing that the EPA could regulate toxics under section 304 rather than section 307. Thus, the agreement represents

³ The EPA also remains free to initiate rulemaking proceedings for pollutants and point sources not specified in the agreement. Intervenors cannot, therefore, argue that the agreement imposes a negative restraint on the EPA's ability to choose appropriate subjects for regulation.

a compromise by the plaintiffs, insofar as they accept this defense. The agreement similarly represents a compromise by defendants, who bind themselves to a mandatory schedule of regulation, even though they originally took the position that all regulation was discretionary. This is a classic settlement and it is consistent with Congress' intent that water pollution be curbed by 1983. *See* Federal Water Pollution Control Act, § 101, 33 U.S.C. § 1251 (Supp. IV 1974). Third, the decree does not abandon section 307, but provides for regulation under several sections, including 307.

An appropriate order accompanies this memorandum. In addition to implementing the settlement agreement, the order consolidates the four cases.

/s/ Thomas A. Flannery
United States District Judge

June 9, 1976

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2153-73

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Plaintiffs,

v.

RUSSELL E. TRAIN,
Defendant.

Civil Action No. 75-172

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Plaintiffs,

v.

RUSSELL E. TRAIN,
Defendant.

Civil Action No. 75-1698

CITIZENS FOR A BETTER ENVIRONMENT, *et al.*,
Plaintiffs,

v.

RUSSELL E. TRAIN,
Defendant.

Civil Action No. 75-1267

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Plaintiff,

v.

JAMES I. AGEE, *et al.*,
Defendants.

[Filed June 9, 1976]

FINAL ORDER AND DECREE

WHEREAS, the plaintiffs and the federal defendants to the above-captioned cases have agreed to the attached Settlement Agreement which they consider a fair and adequate resolution of the issues involved in each of the above-captioned cases; and

WHEREAS, this court finds and determines that the attached Settlement Agreement represents a just, fair, and equitable resolution of the issues raised in the above-captioned cases; and

WHEREAS, the attached Settlement Agreement is made a part of this Decree and incorporated herein by reference; and

WHEREAS, the court takes cognizance that the intervening defendants do not waive any right to pursue in litigation any position inconsistent with this Decree or to challenge on any grounds regulations promulgated pursuant to this Decree; and

WHEREAS, the court by this Decree expresses no opinion as to whether the actions to be taken by the federal defendants pursuant to this Decree will or will not conform to the statutes and laws of the United States;

NOW THEREFORE, it is ORDERED, ADJUDGED and DECREED that:

- (1) The four above-captioned cases shall be consolidated;
- (2) The attached Settlement Agreement is approved;
- (3) Compliance with its terms and provisions is directed; and
- (4) Jurisdiction is retained to effectuate compliance with its terms and conditions.

/s/ Thomas A. Flannery
United States District Judge

June 9, 1976

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2153-73

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Plaintiffs,

v.

RUSSELL E. TRAIN,
Defendant,

Civil Action No. 75-0172

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Plaintiffs,

v.

RUSSELL E. TRAIN,
Defendant,

Civil Action No. 75-1698

CITIZENS FOR A BETTER ENVIRONMENT, *et al.*,
Plaintiffs,

v.

RUSSELL E. TRAIN,
Defendant,

Civil Action No. 75-1267

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Plaintiff,

v.

JAMES I. AGEE, *et al.*,
Defendants.

[Filed June 9, 1976]

SETTLEMENT AGREEMENT

WHEREAS, the Administrator of the Environmental Protection Agency (hereinafter the "Agency"), defendant in the above-captioned law suits, is empowered under the Federal Water Pollution Control Act, as amended, Pub. L. 92-500, 86 Stat. 816, 33 U.S.C. §§ 1251 *et seq.*, (hereinafter "the Act"), to develop and promulgate regulations establishing effluent limitations and guidelines and new source performance standards based upon considerations of technology and other factors enumerated in the Act, and specifically in Sections 301, 304(b), and 306, for the purpose of controlling the discharge of pollutants from point sources into the navigable waters of the United States; and

WHEREAS, defendant has promulgated a substantial number of regulations pursuant to the aforesaid authority applicable to specified industrial categories and sub-categories of point source discharges, and additional such regulations are expected to be promulgated in the future; and

WHEREAS, all such effluent limitations which are designed to require application of "the best available technology economically achievable" under Section 301(b)(2) are required to be reviewed by defendant "at least every five years and, if appropriate, revised" pursuant to Section 301(d) of the Act; and

WHEREAS, pursuant to Section 307(a) of the Act, defendant is required to publish a list of toxic pollutants and thereafter to propose and promulgate effluent standards for such toxic pollutants which shall take into account "the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms," and which shall provide "an ample margin of safety"; and

WHEREAS, pursuant to Section 307(b) of the Act, defendant is required to establish "pretreatment standards for introduction of pollutants into treatment works (as defined in Section 212 of the Act) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works"; and

WHEREAS, on September 7, 1973, defendant promulgated a list of nine toxic pollutants (namely aldrin/dieldrin, benzidine, cadmium, cyanide, DDT (DDE, DDD), endrin, polychlorinated biphenyls, mercury and toxaphene) and on December 27, 1973, proposed standards for said pollutants; and

WHEREAS, hearings were held on said proposed standards during April and May, 1974, but final toxic pollutant effluent standards have never been promulgated due to the Agency's belief that the record developed at the hearings would not support final standards; and

WHEREAS, plaintiffs in Civil Action No. 2153-73 seek an order of this Court directing defendant to add certain substances to the list of toxic pollutants published by the Agency on September 7, 1973 under Section 307(a) and to amend his selection criteria for such substances, which action was dismissed by this Court on May 23, 1974, *Natural Resources Defense Council v. Train*, 6 ERC 1702 (D.D.C. 1974), and which case was remanded by the United States Court of Appeals for the District of Columbia Circuit to this Court on September 15, 1975, 519 F.2d 287 (D.C. Cir. 1975) with instructions that the Court consider the entire administrative record and reconsider its decision; and

WHEREAS, plaintiffs in Civil Actions No. 75-0172 and 75-1698 in their respective complaints seek orders declaring that defendant has a statutory duty to promulgate final toxic pollutant effluent standards for the nine substances on the list promulgated by him on September

7, 1973, and directing defendant to promulgate such standards; and defendant in Civil Action No. 75-0172 has filed an answer therein admitting certain allegations and denying others; and

WHEREAS, plaintiff in Civil Action No. 75-1267 seeks an order declaring that defendants have a duty to establish pretreatment standards under Section 307(b) of the Act and directing defendants to promulgate the pretreatment standards required by the Act and as described in said complaint; and

WHEREAS, the parties to this Agreement believe the agreement as hereinafter set forth constitutes an appropriate resolution of the issues raised by the above-captioned complaints;

NOW THEREFORE, it is hereby Stipulated and Agreed as follows:

A. The Standards of Control

1. In accordance with the Schedule set out in paragraph 7 below, and as further specified in paragraphs 4, 5, and 6 below, the Administrator shall develop and promulgate regulations which shall establish and require achievement at the earliest possible time, but in no case later than June 30, 1983, of effluent limitations and guidelines for classes and categories of point sources which shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharges of all pollutants, including toxic pollutants. These regulations shall establish limitations and guidelines which meet or incorporate the following criteria:

(a) such regulations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to this Agreement and to

Sections 308 and 315 of the Act), that such elimination is technologically and economically achievable for a category or class of point sources;

(b) in establishing such effluent limitations and guidelines, the regulations shall identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for each class or category of point sources; and

(c) in establishing such effluent limitations and guidelines, the Administrator shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

2. In accordance with the Schedule set out in paragraph 7 below, and as further specified in paragraphs 4, 5 and 6 below, the Administrator shall develop and promulgate regulations which shall establish national standards of performance for classes and categories of new point sources which standards shall reflect for each class or category the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants. Such standards shall be developed and applied in the manner specified in Section 306 of the Act.

3. In accordance with the Schedules set out in paragraphs 7 and 13 below, and as further specified in para-

graphs 4, 5, 6 and 13 below, the Administrator shall develop and promulgate regulations which shall establish pretreatment standards for introduction of pollutants into treatment works (as defined in Section 212 of the Act) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which interfere with, pass through, or are otherwise incompatible with such works. Such standards shall be developed and applied in the manner specified in Section 307(b) and (c).

B. *Specified Pollutants*

4.(a) Except as provided in paragraph 8 below, for each class or category of point sources for which effluent limitations and guidelines and new source standards of performance are developed pursuant to this Agreement, such regulations shall establish effluent limitations and guidelines and new source standards of performance expressly applicable to each of the pollutants listed in Appendix A to this Agreement. Except as provided in paragraph 8 below, for each class or category of point sources * for which pretreatment standards are developed pursuant to this Agreement, such regulations shall establish pretreatment standards expressly applicable (i) to each of those pollutants listed in Appendix A to this Agreement which pollutants are introduced into treatment works (as defined in Section 212 of the Act) which are publicly owned from point sources within such class or category and which pollutants are not susceptible to treatment by such treatment works or which interfere with, pass through, or are otherwise incompatible with such works and (ii) to such other pollutants which are introduced into such treatment works and which are not susceptible

* As used in this Agreement, the term "point sources" applies both to discharges of pollutants into navigable waters and to the introduction of pollutants into treatment works (as defined in Section 212 of the Act) which are publicly owned.

to treatment by such treatment works or which interfere with, pass through, or are otherwise incompatible with such works.

(b) In addition to those pollutants for which regulations must be established pursuant to Subsection (a) of this paragraph 4, the Administrator shall also identify the categories or category of point sources which are discharging into navigable waters or introducing into treatment works (as defined in Section 212 of the Act) which are publicly owned the pollutants listed in Appendix C to this Agreement.

C. The Point Source Categories

5. The regulations developed pursuant to this Agreement shall establish effluent limitations and guidelines, new source standards of performance, and, except as provided in paragraph 8 below, pretreatment standards, for each of the classes or categories (herein referred to as "categories" or "category") of point sources listed in Appendix B to this Agreement. The scope of point source coverage of each listed category is determined by the Standard Industrial Classification (SIC) Code numbers or numbers which are set forth in Appendix B for each listed industrial category.

D. Point Source Coverage

6.(a) The effluent limitations and guidelines, and standards of performance and, except as provided in subparagraph (b) below, pretreatment standards promulgated for each of the point source categories listed in Appendix B shall cover at least 95 percent of the point sources which are within that category.

(b) The pretreatment standards which shall be developed and promulgated pursuant to the schedule set out in paragraph 13 of this Agreement shall, for each of the point source categories listed in subparagraph 13(b),

cover (i) at least 95 percent of the point sources, as defined in subparagraph (a) above, which are within that category, or (ii) at least 95 percent of the amount of those pollutants introduced into treatment works (as defined in Section 212 of the Act) which are publicly owned by the point sources which comprise each such point source category and which pollutants are not susceptible to treatment by such treatment works or which interfere with, pass through, or are otherwise incompatible with such treatment works.

E. Regulation Development Schedule

7.(a) In developing the data necessary to issue the regulations described above for each of the point source categories listed in Appendix B, the Administrator shall engage the services of such contractors as he deems appropriate to gather and assemble information relating to technology, ecological and public health effects, and economic impact, according to the following time table. Contracts comprehensively covering all matters to be studied shall be executed for three categories not later than June 30, 1976; for another two categories not later than September 30, 1976; for another five categories not later than December 31, 1976; for another six categories not later than June 30, 1977; and for the remaining five categories not later than October 31, 1977. For purposes of compliance with the foregoing the Administrator shall be deemed in compliance with the June 30, 1976, deadline if with respect to the contracts required to be executed by said date he has issued Requests For Proposal which result in the execution of contracts within sixty days following such date. Contractors shall be required to the maximum feasible extent to complete their performance within 12 months or less from the date of execution of such contract, provided, however, that contractors for contracts executed during the period ending October 31, 1977, shall be required to complete their performance on or before October 31, 1978. Not-

withstanding the provisions of the foregoing sentence, the parties to this Agreement recognize that contracts for economics studies normally require for their performance a period of time extending approximately three months beyond completion of technology studies, and the Administrator shall not be deemed to be in default of the performance of his obligations under this paragraph if such additional three month period beyond the 12 month (or other) period allowed for technology and ecological and public health studies is allowed for completion of a related economics study.

(b) The regulations required to be developed under this Agreement for each category shall be proposed by publication in the *Federal Register* not later than 6 months following the completion of performance of the contract or contracts issued for each such category, and shall be finally promulgated for such category not later than 6 months following proposal. Proposed regulations for five categories shall be published in the *Federal Register* not later than September 30, 1978; proposed regulations for another five categories shall be published in the *Federal Register* not later than December 31, 1978; proposed regulations for another six categories shall be published in the *Federal Register* not later than March 31, 1979; and proposed regulations for the remaining five categories shall be published in the *Federal Register* not later than June 30, 1979. Final regulations for five categories shall be promulgated not later than March 31, 1979; final regulations for another five categories shall be promulgated not later than June 30, 1979; final regulations for another six categories shall be promulgated not later than September 30, 1979; and final regulations for the remaining five categories shall be promulgated not later than December 31, 1979.

(c) In determining the order or priority in which such category-by-category contracts are issued, the Administrator shall follow the prioritization set forth in Appen-

dix B, except that where information comes to the attention of the Administrator indicating that the goals and purposes of the Act can be better served by changing the prioritization of any one or more categories, he may do so and shall promptly advise the parties to the captioned cases in writing of his decision to do so; the parties to this Agreement intend, however, that such changes shall be few in number. In no event, however, shall a change in priority result in promulgation of fewer regulations than are required on a cumulative basis by subparagraphs (a) and (b) above.

(d) Compliance with the dates for publication of proposed regulations and for promulgation of final regulations shall be deemed satisfied if the Administrator signs the regulations for each listed category of point sources on or before the date specified in the Schedule. The Administrator shall use his best efforts to obtain the earliest possible *Federal Register* publication following his signature of each proposed and final regulation. The regulations shall be effective not later than 30 days following their publication in the *Federal Register*.

F. *Exclusion Of Point Source Categories And Exclusion Of Substances From Specific Point Source Categories Or Subcategories*

8.(a) Upon completion of the technology, economic, and public health and ecological data gathering, including contracts, for a point source category listed in Appendix B and prior to publication of proposed regulations for such point source category, the Administrator may exclude from regulation under the effluent limitations and guidelines, standards of performance, and/or pretreatment standards contemplated by this Agreement for such category a specific pollutant for any of the following reasons, based upon information available to him:

(i) Equally or more stringent protection is already provided by an effluent, new source performance, or pre-

treatment standard or by an effluent limitation and guideline promulgated pursuant to Section(s) 301, 304, 306, 307(a), 307(b) or 307(c) of the Act.

(ii) Except for pretreatment standards, the specific pollutant is present in the effluent discharge solely as a result of its presence in intake waters taken from the same body of water into which it is discharged and, for pretreatment standards, the specific pollutant is present in the effluent which is introduced into treatment works (as defined in Section 212 of the Act) which are publicly owned solely as a result of its presence in the point source's intake waters, *provided however*, that such point source may be subject to an appropriate effluent limitation for such pollutant pursuant to the requirements of Section 307; or

(iii) the specific pollutant is either not present in the discharge or in the effluent which is introduced into treatment works (as defined in Section 212 of the Act) which are publicly owned or is present only in trace amounts and is neither causing, nor likely to cause, toxic effects with respect to any identifiable organisms affected or likely to be affected by such discharge or effluent.

Such exclusions may also be made following proposal or promulgation of standards whenever information comes to the attention of the Administrator indicating that exclusion for any of the foregoing reasons is warranted.

(b) Upon completion of the technology, economic, and public health and ecological data gathering, including contracts, for a point source category listed in Appendix B and prior to publication of proposed regulations for such point source category, the Administrator may exclude from regulation under the pretreatment standards contemplated by this Agreement all point sources within a point source category or point source subcategory:

(i) if 95 percent or more of all point sources in the point source category or subcategory introduce into treatment works (as defined in Section 212 of the Act) which are publicly owned only pollutants which are susceptible to treatment by such treatment works and which do not interfere with, do not pass through, or are not otherwise incompatible with such treatment works, or

(ii) if

(A) the amount of pollutants introduced by such point sources into treatment works (as defined in Section 212 of the Act) which are publicly owned which pollutants are not susceptible to treatment by such treatment works or interfere with, pass through, or are otherwise incompatible with such treatment works and

(B) the toxicity of such pollutants taken together is so insignificant as not to justify developing a pretreatment regulation in accordance with the schedules set out in paragraphs 7 and 13 of this Agreement.

(c) Whenever the Administrator decides to exclude a point source category or a specific pollutant from coverage pursuant to this section of this Agreement, he shall promptly serve upon the parties to the captioned cases, or their designated representative or attorney, a statement under oath designating the point source category or subcategory or specific pollutant to be excluded together with the reasons therefore. Such statement shall detail the reasons for the Administrator's exclusion, and shall set forth the data and information forming the basis for the exclusion. Proposed regulations for each point source category or subcategory shall identify each such exclusion, shall summarize the Administrator's statement, and shall invite public comments on such exclusion.

G. Progress Reports

9. The Administrator shall provide the parties to the captioned cases quarterly oral briefings which shall discuss in reasonable detail the progress of the Agency and its contractors in the development and promulgation of the regulations required by this Agreement, and as appropriate shall provide the parties to the captioned cases with pertinent documents and written materials supporting such progress reports.

H. Application Of Regulations To Point Sources

10. The regulations developed pursuant to this Agreement shall be applied and shall be required to be applied by the Administrator to the full extent of his authority as expeditiously as possible to all point sources covered by such regulations. Such application:

(a) shall where applicable be accomplished by issuance or modification of an NPDES permit; with respect to any NPDES permit issued pursuant to Section 402(a) and (b) of the Act for any point source within a point source category listed in Appendix B which is issued or renewed on or after January 1, 1978, but prior to promulgation of the applicable regulations required hereunder, the Administrator shall require a provision in the permit that such permit shall be revised or modified so as to require compliance with any more stringent effluent limitation, guideline, or standard which may be established for such point source category pursuant to this Agreement;

(b) shall require achievement of any effluent limitation or guideline or pretreatment standard at the earliest possible time but in no case later than June 30, 1988; and

(c) shall apply new source performance standards and pretreatment standards in the manner specified in Sections 306 and 307 of the Act.

I. Additional Protection Of Public Health

11. Not later than June 30, 1978, after opportunity for public comment, the Administrator shall publish under Section 304(a) of the Act water quality criteria accurately reflecting the latest scientific knowledge on the kind and extent of all identifiable effects on aquatic organisms and human health of each of the pollutants listed in Appendix A. Such water quality criteria shall state, *inter alia*, for each of the pollutants listed in Appendix A, the recommended maximum permissible concentrations (including where appropriate zero) consistent with the protection of aquatic organisms, human health, and recreational activities.

12. Whenever in the judgment of the Administrator the discharge of any pollutant listed in Appendix A by a point source or group of point sources would, with application of effluent limitations, guidelines and standards otherwise mandated under this Agreement, interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, the Administrator shall forthwith establish more stringent effluent limitations and guidelines (including alternative effluent control strategies) for such point source or sources pursuant to his authority under Section 302, or at his discretion under Sections 301/303 or 307(a).^{*} Not later than June 30, 1978, the Administrator shall establish a specific and substantial program with the objective and capability of determining whether more stringent effluent limitations, guidelines, and standards are necessary under this Paragraph 12.

^{*} This reference to the various Sections of the Act reflects the agreement of the parties hereto that under this Agreement the

J. Promulgation Of Pretreatment Regulations For Specific Point Source Categories

13.(a) In accordance with the Schedule set out in subparagraph (b) below, the Administrator shall develop and promulgate regulations which shall establish pretreatment standards for introduction of pollutants into treatment works (as defined in Section 212 of the Act) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which interfere with, pass through or are otherwise incompatible with such works. Such standards shall be developed and applied in the manner specified in Sections 307(b) and (c) of the Act. Limitations regarding point source coverage shall be consistent with the requirements of paragraph 6 of this Agreement. The parties to this Agreement agree that the pretreatment standards promulgated pursuant to the schedule set out in this paragraph shall be generally analogous to best practicable control technology currently available as set out in Sections 301(b) (1) (A) and 304(b) (1) of the Act as distinguished from the pretreatment standards promulgated pursuant to paragraph 7 above to which both technological standards set out in Sections 301(b) (1) (A) and 301(b) (2) (A) and 304(b) shall apply.

(b) Pretreatment regulations as provided in subparagraph (a) above shall be promulgated according to the following schedule:

Administrator may act under Sections 301/303 (water quality standards), Section 307(a), or Section 302 in establishing such more stringent limitations. It does not reflect any agreement among the parties to this Agreement as to whether the Administrator must act under more than one of these authorities.

Point Source Category *	Promulgation Date
Timber Products Processing	October 15, 1976
Nonferrous Metals Manufacturing	October 15, 1976
Leather Tanning & Finishing	February 15, 1977
Petroleum Refining	February 15, 1977
Steam Electric Power Plants	February 15, 1977
Electroplating	May 15, 1977
Textile Mills	May 15, 1977
Inorganic Chemicals Manufacturing	May 15, 1977

* SIC Code Classifications for each of the above point source categories are set forth in Appendix B attached hereto.

Compliance with the dates for promulgation of final regulations as established by this paragraph shall be deemed satisfied if the Administrator signs the regulations for each listed category of point sources on or before the date specified above. The Administrator shall use his best efforts to obtain the earliest possible *Federal Register* publication following his signature of each final regulation. The regulations shall be effective not later than 30 days following their publication in the *Federal Register*.

K. *Standards Under Section 307(a)*

14. The Administrator shall propose standards pursuant to Section 307(a) of the Act for aldrin/dieldrin, DDT (DDD, DDE), endrin, and toxaphene on or before May 31, 1976; and for benzidine on or before June 22, 1976; and for polychlorinated biphenyls (PCB's) on or before July 14, 1976. Not later than six months following proposal of each set of such standards, the Administrator shall promulgate final standards for each of such pollutants.

L. *General Provisions*

15. *Section and Paragraph Headings*

The headings and titles of the various sections and paragraphs of this Agreement are intended for purposes

of identification and convenience only and are not to be construed as imparting or affecting any substantive rights or obligations under this Agreement.

16. *Complete Agreement*

This Agreement, together with the Appendices attached hereto and identified herein, constitute the entire agreement between the parties to this Agreement concerning the rights and obligations herein discussed, and shall become effective upon its approval and incorporation into an appropriate order by the United States District Court for the District of Columbia.

17. *Notice to Parties, Designation*

Any notice or modification required to be served upon any of the parties to this Agreement under any of the terms of this Agreement shall be given as follows:

If to defendants Russel E. Train, James I. Agee, or
Environmental Protection Agency:

General Counsel
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Thomas A. Pursley, III, Esq.
Land & Natural Resources Division
Department of Justice
9th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

If to plaintiff Natural Resources Defense Council, Inc.:

Director, Project On Clean Water
Natural Resources Defense Council, Inc.
917 15th Street, N.W.
Washington, D.C. 20005

If to plaintiff Environmental Defense Fund, Inc.:

Dr. Robert Harris
Environmental Defense Fund, Inc.
1525 18th Street, N.W.
Washington, D.C. 20036

Ronald J. Wilson, Esq.
810 18th Street, N.W.
Washington, D.C. 20006

If to plaintiff Businessmen for the Public Interest,
Inc.:

David D. Comey
Director, Environmental Research
Business and Professional People
for the Public Interest
129 North Dearborn Street
Chicago, Illinois 60606

If to plaintiff National Audubon Society, Inc.:

Louis R. Proyect, Esq.
Gifford, Woody, Carter & Hays
One Wall Street
New York, New York 10005

If to plaintiffs Citizens for a Better Environment or
Dennis L. Adameczyk:

Sherwood L. Levin, Esq.
188 W. Randolph Street
Chicago, Illinois 60601

If to intervening defendants National Coal Association
and member companies:

Robert F. Stauffer
General Counsel
National Coal Association
1130 17th Street, N.W.
Washington, D.C. 20036

Any party to this Agreement may change his designee for notice by sending written notice of such change to each of the other such parties.

18. By executing this agreement, any intervening defendant signatory does not waive any right to pursue in litigation any position inconsistent with this Decree or to challenge on any grounds regulations promulgated pursuant to this Decree;

IN WITNESS WHEREOF, the parties to this Agreement have executed this Settlement Agreement this 7 day of June, 1976.

NATURAL RESOURCES DEFENSE COUNCIL, INC.;
ENVIRONMENTAL DEFENSE FUND, INC.;
BUSINESSMEN FOR THE PUBLIC INTEREST, INC.;
AND NATIONAL AUDUBON SOCIETY, INC., PLAINTIFFS

By /s/ Ronald J. Wilson
RONALD J. WILSON
810 18th Street, N.W.
Washington, D.C. 20006

By /s/ J. G. Speth
J. G. SPETH
Natural Resources Defense
Council, Inc.
917 15th Street, N.W.
Washington, D.C. 20005

By /s/ Edward L. Strohbehn, Jr.
EDWARD L. STROHBEHN, JR.
Natural Resources Defense
Council, Inc.
917 15th Street, N.W.
Washington, D.C. 20005

CITIZENS FOR A BETTER ENVIRONMENT
AND DENNIS L. ADAMCZYK,

By /s/ Sherwood L. Levin
SHERWOOD L. LEVIN
188 W. Randolph Street
Chicago, Illinois 60601

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY;
JAMES I. AGEE, ASSISTANT ADMINISTRATOR
FOR WATER AND HAZARDOUS MATERIALS,
AND ENVIRONMENTAL PROTECTION AGENCY, DEFENDANTS

By /s/ Peter R. Taft
PETER R. TAFT
Assistant Attorney General
Department of Justice

By /s/ Alfred T. Ghiorzi
ALFRED T. GHIORZI
Acting Chief,
Pollution Control Section
Department of Justice

By /s/ Thomas A. Pursley, III
THOMAS A. PURSLEY, III
Attorney
Department of Justice
Washington, D.C. 20530

By /s/ G. William Frick
G. WILLIAM FRICK
General Counsel
Environmental Protection
Agency
Washington, D.C. 20460

NATIONAL COAL ASSOCIATION AND MEMBER
COMPANIES, INTERVENING DEFENDANTS

By /s/ Robert F. Stauffer
ROBERT F. STAUFFER
General Counsel
National Coal Association
1130 17th Street, N.W.
Washington, D.C. 20036

APPENDIX A

Acenaphthene
Acrolein
Acrylonitrile
Aldrin/Dieldrin
Antimony and compounds*
Arsenic and compounds
Asbestos
Benzene
Benzidine
Beryllium and compounds
Cadmium and compounds
Carbon tetrachloride
Chlordane (technical mixture and metabolites)
Chlorinated benzenes (other than dichlorobenzenes)
Chlorinated ethanes (including 1,2-dichloroethane, 1,1,1-trichloroethane, and hexachloroethane)
Chloroalkyl ethers (chloromethyl, chloroethyl, and mixed ethers)
Chlorinated naphthalene
Chlorinated phenols (other than those listed elsewhere; includes trichlorophenols and chlorinated cresols)
Chloroform
2-chlorophenol
Chromium and compounds
Copper and compounds
Cyanides
DDT and metabolites
Dichlorobenzenes (1,2-, 1,3-, and 1,4-dichlorobenzenes)
Dichlorobenzidine
Dichloroethylenes (1,1- and 1,2-dichloroethylene)
2,4-dichlorophenol
Dichloropropane and dichloropropene

* As used throughout this Appendix A the term "compounds" shall include organic and inorganic compounds.

2,4-dimethylphenol
Dinitrotoluene
Diphenylhydrazine
Endosulfan and metabolites
Endrin and metabolites
Ethylbenzene
Fluoranthene
Haloethers (other than those listed elsewhere; includes chlorophenylphenyl ethers, bromophenylphenyl ether, bis-(dischloroisopropyl) ether, bis-(chloroethoxy) methane and polychlorinated diphenyl ethers)
Halomethanes (other than those listed elsewhere; includes methylene chloride, methylchloride, methylbromide, bromoform, dichlorobromomethane, trichlorofluoromethane, dichlorodifluoromethane)
Heptachlor and metabolites
Hexachlorobutadiene
Hexachlorocyclohexane (all isomers)
Hexachlorocyclopentadiene
Isophorone
Lead and compounds
Mercury and compounds
Naphthalene
Nickel and compounds
Nitrobenzene
Nitrophenols (including 2,4-dinitrophenol, dinitroresol)
Nitrosamines
Pentachlorophenol
Phenol
Phthalate esters
Polychlorinated biphenyls (PCBs)
Polynuclear aromatic hydrocarbons (including benzan-
thracenes, benzopyrenes, benzofluoranthene, chrysenes,
dibenzanthracenes, and indenopyrenes)
Selenium and compounds
Silver and compounds
2,3,7,8-Tetrachlorodibenzo-p-dioxin (TCDD)

Tetrachloroethylene
Thallium and compounds
Toluene
Toxaphene
Trichloroethylene
Vinyl chloride
Zinc and compounds

APPENDIX B

The scope of coverage for the point source categories listed below is as set forth in Paragraphs 5 and 6 of the Agreement.

*Point Source Categories***1. TIMBER PRODUCTS PROCESSING**

- SIC 2411—Logging Camps and Logging Contractors (Camps Only)
- SIC 2421—Saw Mills and Planing Mills, General
- SIC 2426—Hardwood Dimension and Flooring Mills
- SIC 2429—Special Purpose Sawmills, Not Elsewhere Classified
- SIC 2431—Millwork
- SIC 2434—Wood Kitchen Cabinets
- SIC 2435—Hardwood Veneer and Plywood
- SIC 2436—Softwood Veneer and Plywood
- SIC 2439—Structural Wood Members, Not Elsewhere Classified
- SIC 2491—Wood Preserving
- SIC 2499—Wood Products, Not Elsewhere Classified (Furniture Mills)
- SIC 2661—Building Paper and Building Board Mills (Hardboard Only)

2. STEAM ELECTRIC POWER PLANTS

- SIC 4911—Electric Services (Limited to Steam-Electric Power Plants)

3. LEATHER TANNING AND FINISHING

- SIC 31 —Leather and Leather Products

4. IRON AND STEEL MANUFACTURING

- SIC 3312—Blast Furnaces (Including Coke Ovens), Steel Works and Rolling Mills

- SIC 3313—Electrometallurgical Products
- SIC 3315—Steel Wire Drawing and Steel Nails and Spikes
- SIC 3316—Cold Rolled Steel Sheet, Strip and Bars
- SIC 3317—Steel Pipe and Tubes

5. *PETROLEUM REFINING*

- SIC 2911—Petroleum Refining (Including 1) Topping Plant; 2) Topping and Cracking Plants; 3) Topping, Cracking and Petro-chemical Plants; 4) Integrated Plants; and, 5) Integrated and Petro-chemical Plants)

6. *INORGANIC CHEMICALS MANUFACTURING*

- SIC 2812—Alkalies and Chlorine
- SIC 2813—Industrial Gasses
- SIC 2816—Inorganic Pigments
- SIC 2819—Industrial Inorganic Chemicals, Not Elsewhere Classified

7. *TEXTILE MILLS*

- SIC 22—Textile Mills Products
- SIC 23—Apparel and Other Finished Products Made from Fabrics and Similar Materials

8. *ORGANIC CHEMICALS MANUFACTURING*

- SIC 2865—Cyclic (Coal Tar) Crudes, and Cyclic Intermediates, Dyes, and Organic Pigments (Lakes and Toners)
- SIC 2869—Industrial Organic Chemicals, Not Elsewhere Classified

9. *NONFERROUS METALS MANUFACTURING*

- SIC 2819—Industrial Inorganic Chemicals, Not Elsewhere Classified (Bauxite Refining Only)
- SIC 3331—Primary Smelting and Refining of Copper
- SIC 3332—Primary Smelting and Refining of Lead
- SIC 3333—Primary Smelting and Refining of Zinc
- SIC 3334—Primary Production of Aluminum
- SIC 3339—Primary Smelting and Refining of Nonferrous Metals, Not Elsewhere Classified
- SIC 3341—Secondary Smelting and Refining of Nonferrous Metals

10. *PAVING AND ROOFING MATERIALS (TARS AND ASPHALT)*

- SIC 2951—Paving Mixtures and Blocks
- SIC 2952—Asphalt Felts and Coatings
- SIC 3996—Linoleum, Asphalted-Felt-Base, and Other Hard Surface Floor Coverings, Not Elsewhere Classified

11. *PAINT AND INK FORMULATION AND PRINTING*

- SIC 2711—Newspapers: Publishing, Publishing and Printing
- SIC 2721—Periodicals: Publishing, Publishing and Printing
- SIC 2731—Books: Publishing, Publishing and Printing
- SIC 2732—Book Printing
- SIC 2741—Miscellaneous Publishing
- SIC 2751—Commercial Printing, Letterpress and Screen
- SIC 2752—Commercial Printing, Letterpress and Lithographic
- SIC 2753—Engraving and Plate Printing

- SIC 2754—Commercial Printing, Gravure
- SIC 2761—Mainfold Business Forms
- SIC 2771—Greeting Card Publishing
- SIC 2793—Photoengraving
- SIC 2794—Electrotyping and Stereotyping
- SIC 2795—Lithographic Platemaking and Related Services
- SIC 2851—Paints, Varnishes, Lacquers, Enamels, and Allied Products
- SIC 2893—Printing Ink
- SIC 3951—Pens, Mechanical pencils, and Parts and Stamp Pads (Inked Materials Only)
- SIC 3952—Lead Pencils, Crayons, and Artists' Materials
- SIC 3955—Carbon Paper and Inked Ribbons

12. SOAP AND DETERGENT MANUFACTURING

- SIC 2841—Soap and Other Detergents, except Specialty Cleaners

13. AUTO AND OTHER LAUNDRIES

- SIC 7211—Power Laundries, Family and Commercial
- SIC 7213—Linen Supply
- SIC 7214—Diaper Service
- SIC 7215—Coin-operated Laundries and Dry Cleaning
- SIC 7216—Dry Cleaning Plants, Except Rug Cleaning
- SIC 7217—Carpet and Upholstery Cleaning
- SIC 7218—Industrial Laundries
- SIC 7219—Laundry and Garment Services, Not Elsewhere Classified
- None —Auto Wash Establishments

14. *PLASTIC AND SYNTHETIC MATERIALS MANUFACTURING*

SIC 282—Plastic Materials and Synthetic Resins,
Synthetic and Other Manmade Fibers,
except Glass

15. *PULP AND PAPERBOARD MILLS; AND CONVERTED PAPER PRODUCTS*

SIC 2611—Pulp Mills

SIC 2621—Paper Mills, except Building Paper Mills

SIC 2631—Paperboard Mills

SIC 2641—Paper Coating and Glazing

SIC 2642—Envelopes

SIC 2643—Bags, Except Textile Bags

SIC 2645—Die-Cut Paper and Paperboard and
Cardboard

SIC 2646—Pressed and Molded Pulp Goods

SIC 2647—Sanitary Paper Products

SIC 2648—Stationery, Tablets, and Related Products

SIC 2649—Converted Paper and Paperboard Products,
Not Elsewhere Classified

SIC 2651—Folding Paperboard Boxes

SIC 2652—Set-up Paperboard Boxes

SIC 2653—Corrugated and Solid Fiber Boxes

SIC 2654—Sanitary Food Containers

SIC 2655—Fiber Cans, Tubes, Drums, and Similar
Products

SIC 2661—Building Paper and Building Board
Mills

SIC 2782—Blankbooks, Looseleaf Binders and
Devices

16. *RUBBER PROCESSING*

SIC 2822—Synthetic Rubber (Vulcanizable Elastomers)

- SIC 2891—Rubber Cement
- SIC 3011—Tires and Inner Tubes
- SIC 3021—Rubber and Plastics Footwear (Rubber Only)
- SIC 3031—Reclaimed Rubber
- SIC 3041—Rubber and Plastics Hose and Belting (Rubber Only)
- SIC 3069—Fabricated Rubber Products, Not Elsewhere Classified
- SIC 3293—Gaskets, Packing, and Sealing Devices (Rubber Packing Only)

17. MISCELLANEOUS CHEMICALS

- SIC 2831—Biological Products
- SIC 2833—Medicinal Chemicals and Botanical Products
- SIC 2834—Pharmaceutical Preparations
- SIC 2861—Gum and Wood Chemicals
- SIC 2879—Pesticides and Agricultural Chemicals, Not Elsewhere Classified
- SIC 2891—Adhesive and Sealants
- SIC 2892—Explosives
- SIC 2895—Carbon Black
- SIC 2899—Chemicals and Chemical Preparation, Not Elsewhere Classified
- SIC 3861—Photographic Equipment and Supplies

18. MACHINERY AND MECHANICAL PRODUCTS MANUFACTURING

- SIC 3021—Rubber and Plastics Footwear (Balance)
- SIC 3041—Rubber and Plastics Hose and Belting (Balance)
- SIC 3079—Miscellaneous Plastics Products
- SIC 3293—Gaskets, Packing, and Sealing Devices (Balance)
- SIC 3321—Gray Iron Foundries

- SIC 3322—Malleable Iron Foundries
- SIC 3324—Steel Investment Foundries
- SIC 3325—Steel Foundries, Not Elsewhere Classified
- SIC 3351—Rolling, Drawing, and Extruding of Copper
- SIC 3353—Aluminum Sheet, Plate, and Foil
- SIC 3354—Aluminum Extruded Products
- SIC 3355—Aluminum Rolling and Drawing, Not Elsewhere Classified
- SIC 3356—Rolling, Drawing, and Extruding of Nonferrous Metals, except copper and aluminum
- SIC 3357—Drawing and Insulating of Nonferrous Wire
- SIC 3361—Aluminum Foundries (Castings)
- SIC 3362—Brass, Bronze, Copper, Copper Base Alloy Foundries (Castings)
- SIC 3369—Nonferrous Foundries (Castings), Not Elsewhere Classified
- SIC 3398—Metal Heat Treating
- SIC 3399—Primary Metal Products, Not Elsewhere Classified
- SIC 3411—Metal Cans
- SIC 3412—Metal Shipping Barrels, Drums, Kegs, and Pails
- SIC 3421—Cutlery
- SIC 3423—Hand and Edge Tools, Except Machine Tools and Hand Saws
- SIC 3425—Hand Saws and Saw Blades
- SIC 3429—Hardware, Not Elsewhere Classified
- SIC 3431—Enameled Iron and Metal Sanitary Ware
- SIC 3432—Plumbing Fixture Fittings and Trim (Brass Goods)
- SIC 3433—Heating Equipment, Except Electric and Warm Air Furnaces
- SIC 3441—Fabricated Structural Metal

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- SIC 3442—Metal Doors, Sash, Frames, Molding, and Trim
- SIC 3443—Fabricated Platework (Boiler Shops)
- SIC 3444—Sheet Metal Work
- SIC 3446—Architectural and Ornamental Metal Work
- SIC 3448—Prefabricated Metal Buildings and Components
- SIC 3449—Miscellaneous Metal Work
- SIC 3451—Screw Machine Products
- SIC 3452—Bolts, Nuts, Screws, Rivets, and Washers
- SIC 3462—Iron and Steel Forgings
- SIC 3463—Nonferrous Forgings
- SIC 3465—Automotive Stampings
- SIC 3466—Crowns and Closures
- SIC 3469—Metal Stampings, Not Elsewhere Classified
- SIC 3482—Small Arms Ammunition
- SIC 3483—Ammunition, Except for Small Arms, Not Elsewhere Classified
- SIC 3484—Small Arms
- SIC 3489—Ordnance and Accessories, Not Elsewhere Classified
- SIC 3493—Steel Springs, Except Wire
- SIC 3494—Valves and Pipe Fittings, Except Plumbers' Brass Goods
- SIC 3495—Wire Springs
- SIC 3496—Miscellaneous Fabricated Wire Products
- SIC 3497—Metal Foil and Leaf
- SIC 3498—Fabricated Pipe and Fabricated Pipe Fittings
- SIC 3499—Fabricated Metal Products, Not Elsewhere Classified
- SIC 3511—Steam, Gas, and Hydraulic Turbines and Turbine Generator Set Units
- SIC 3519—Internal Combustion Engines, Not Elsewhere Classified

- SIC 3523—Farm Machinery and Equipment
- SIC 3524—Garden Tractors and Lawn and Garden Equipment
- SIC 3531—Construction Machinery and Equipment
- SIC 3532—Mining Machinery and Equipment, Except Oil Field Machinery and Equipment
- SIC 3533—Oil Field Machinery and Equipment
- SIC 3534—Elevators and Moving Stairways
- SIC 3535—Conveyors and Conveying Equipment
- SIC 3536—Hoists, Industrial Cranes, and Monorail Systems
- SIC 3537—Industrial Trucks, Tractors, Trailers, and Stackers
- SIC 3541—Machine Tools, Metal Cutting Types
- SIC 3542—Machine Tools, Metal Forming Types
- SIC 3544—Special Dies and Tools, Die Sets, Jigs and Fixtures and Industrial Molds
- SIC 3545—Machine Tool Accessories and Measuring Devices
- SIC 3546—Power Driven Hand Tools
- SIC 3547—Rolling Mill Machinery and Equipment
- SIC 3549—Metalworking Machinery, Not Elsewhere Classified
- SIC 3551—Food Products Machinery
- SIC 3552—Textile Machinery
- SIC 3553—Woodworking Machinery
- SIC 3554—Paper Industries Machinery
- SIC 3555—Printing Trades Machinery and Equipment
- SIC 3559—Special Industry Machinery, Not Elsewhere Classified
- SIC 3561—Pumps and Pumping Equipment
- SIC 3562—Ball and Roller Bearings
- SIC 3563—Air and Gas Compressors
- SIC 3564—Blowers and Exhaust Ventilation Fans
- SIC 3565—Industrial Patterns
- SIC 3566—Speed Changers, Industrial High Speed Drives, and Gears

- SIC 3567—Industrial Process Furnaces and Ovens
- SIC 3568—Mechanical Power Transmisison Equip-
ment, Not Elsewhere Classified
- SIC 3569—General Industrial Machinery and
Equipment, Not Elsewhere Classified
- SIC 3572—Typewriters
- SIC 3573—Electronic Computing Equipment
- SIC 3574—Calculating and Accounting Machines,
Except Electronic Computing Equip-
ment
- SIC 3576—Scales and Balances, Except Laboratory
- SIC 3579—Office Machines, Not Elsewhere Classi-
fied
- SIC 3581—Automatic Merchandising Machines
- SIC 3582—Commercial Laundry, Dry Cleaning,
and Pressing Machines
- SIC 3585—Air Conditioning and Warm Air Heat-
ing Equipment and Commercial and In-
dustrial Refrigeration Equipment
- SIC 3586—Measuring and Dispensing Pumps
- SIC 3589—Service Industry Machines, Not Else-
where Classified
- SIC 3592—Carburetors, Piston, Piston Rings, and
Valves
- SIC 3599—Machinery, Except Electrical, Not Else-
where Classified
- SIC 3612—Power, Distribution, and Specialty
Transformers
- SIC 3613—Switchgear and Switchboard Apparatus
- SIC 3621—Motors and Generators
- SIC 3622—Industrial Controls
- SIC 3623—Welding Apparatus, Electric
- SIC 3624—Carbon and Graphite Products
- SIC 3629—Electrical Industrial Apparatus, Not
Elsewhere Classified
- SIC 3631—Household Cooking Equipment
- SIC 3632—Household Refrigerators and Home and
Farm Freezers

- SIC 3633—Household Laundry Equipment
- SIC 3634—Electric Housewares and Fans
- SIC 3635—Household Vacuum Cleaners
- SIC 3639—Household Appliances, Not Elsewhere
Classified
- SIC 3641—Electric Lamps
- SIC 3643—Current-Carrying Wiring Devices
- SIC 3644—Noncurrent-Carrying Wiring Devices
- SIC 3645—Residential Electric Lighting Fixtures
- SIC 3646—Commercial, Industrial, and Institu-
tional Electric Lighting Fixtures
- SIC 3647—Vehicular Lighting Equipment
- SIC 3648—Lighting Equipment, Not Elsewhere
Classified
- SIC 3651—Radio and Television Receiving Sets,
Except Communication Types
- SIC 3652—Phonograph Records and Pre-recorded
Magnetic Tape
- SIC 3661—Telephone and Telegraph Apparatus
- SIC 3662—Radio and Television Transmitting, Sig-
naling, and Detection Equipment and
Apparatus
- SIC 3671—Radio and Television Receiving Type
Electron Tubes, Except Cathode Ray
- SIC 3672—Cathode Ray Television Picture Tubes
- SIC 3673—Transmitting, Industrial, and Special
Purpose Electron Tubes
- SIC 3674—Semiconductors and Related Devices
- SIC 3675—Electronic Capacitors
- SIC 3676—Resistors, for Electronic Applications
- SIC 3677—Electronic Coils, Transformers and
Other Inductors
- SIC 3678—Connectors, for Electronic Applications
- SIC 3679—Electronic Components, Not Elsewhere
Classified
- SIC 3691—Storage Batteries
- SIC 3692—Primary Batteries, Dry and Wet

- SIC 3693—Radiographic X-ray, Fluoroscopic X-ray, Therapeutic X-ray, and Other X-ray Apparatus and Tubes; Electromedical and Electrotherapeutic Apparatus
- SIC 3694—Electrical Equipment for Internal Combustion Engines
- SIC 3699—Electrical Machinery, Equipment, and Supplies, Not Elsewhere Classified
- SIC 3711—Motor Vehicles and Passenger Car Bodies
- SIC 3713—Truck and Bus Bodies
- SIC 3714—Motor Vehicle Parts and Accessories
- SIC 3715—Truck Trailers
- SIC 3721—Aircraft
- SIC 3724—Aircraft Engines and Engine Parts
- SIC 3728—Aircraft Parts and Auxiliary Equipment, Not Elsewhere Classified
- SIC 3731—Ship Building and Repairing
- SIC 3732—Boat Building and Repairing
- SIC 3743—Railroad Equipment
- SIC 3751—Motorcycles, Bicycles, and Parts
- SIC 3761—Guided Missiles and Space Vehicles
- SIC 3764—Guided Missile and Space Vehicle Propulsion Units and Propulsion Unit Parts
- SIC 3769—Guided Missile and Space Vehicle Parts and Auxiliary Equipment, Not Elsewhere Classified
- SIC 3792—Travel Trailers and Campers
- SIC 3795—Tanks and Tank Components
- SIC 3799—Transportation Equipment, Not Elsewhere Classified
- SIC 3811—Engineering, Laboratory, Scientific, and Research Instruments and Associated Equipment
- SIC 3822—Automatic Controls for Regulating Residential and Commercial Environments and Appliances

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- SIC 3823—Industrial Instruments for Measurement, Display and Control of Process Variables; and Related Products
- SIC 3824—Totalizing Fluid Meters and Counting Devices
- SIC 3825—Instruments for Measuring and Testing of Electricity and Electrical Signals
- SIC 3829—Measuring and Controlling Devices, Not Elsewhere Classified
- SIC 3832—Optical Instruments and Lenses
- SIC 3841—Surgical and Medical Instruments and Apparatus
- SIC 3842—Orthopedic, Prosthetic, and Surgical Appliances and Supplies
- SIC 3843—Dental Equipment and Supplies
- SIC 3851—Ophthalmic Goods
- SIC 3873—Watches, Clocks, Clockwork Operated Devices and Parts
- SIC 3911—Jewelry, Precious Metal
- SIC 3914—Silverware, Plated Ware, and Stainless Steel Ware
- SIC 3915—Jewelers' Findings and Materials, and Lapidary Work
- SIC 3931—Musical Instruments
- SIC 3942—Dolls
- SIC 3944—Games, Toys, and Children's Vehicles; Except Dolls and Bicycles
- SIC 3949—Sporting and Athletic Goods, Not Elsewhere Classified
- SIC 3951—Pens, Mechanical Pencils, and Parts (Balance)
- SIC 3961—Costume Jewelry and Costume Novelties, Except Precious Metal
- SIC 3991—Brooms and Brushes
- SIC 3993—Signs and Advertising Displays
- SIC 3995—Burial Caskets

19. *ELECTROPLATING*

- SIC 347—Coating, Engraving, and Allied Services

20. ORE MINING AND DRESSING

- SIC 1011—Iron Ores
- SIC 1021—Copper Ores
- SIC 1031—Lead and Zinc Ores
- SIC 1041—Gold Ores
- SIC 1044—Silver Ores
- SIC 1051—Bauxite and Other Aluminum Ores
- SIC 1061—Ferroalloy Ores, Except Vanadium
- SIC 1092—Mercury Ores
- SIC 1094—Uranium-Radium-Vanadium Ores
- SIC 1099—Metal Ores, Not Elsewhere Classified

21. COAL MINING

- SIC 1111—Anthracite
- SIC 1112—Anthracite Mining Services
- SIC 1211—Bituminous Coal and Lignite
- SIC 1213—Bituminous Coal and Lignite Mining
Services

APPENDIX C

Acetone
n-alkanes (C_{10} - C_{30})
Biphenyl
Chlorine
Dialkyl ethers
Dibenzofuran
Diphenyl ether
Methylethyl Ketone
Nitrites
Secondary amines
Styrene
Terpenes

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 75-01698

No. 82-1365

CITIZENS FOR A BETTER ENVIRONMENT
DENNIS L. ADAMCZYK

v.

ANNE GORSUCH, ADMINISTRATOR, U.S.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

AMERICAN IRON AND STEEL INSTITUTE,
UNION CARBIDE CORPORATION,
FMC CORPORATION,
DOW CHEMICAL COMPANY,
CELANESE COMPANY,
E.I. DU PONT DE NEMOURS AND COMPANY,
EXXON CORPORATION,
MONSANTO CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
AMERICAN MINING CONGRESS,
Appellants

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Civil Action No. 75-01267

No. 82-1366

NATURAL RESOURCES DEFENSE COUNCIL, INC.

v.

JAMES I. AGEE, IN HIS OFFICIAL CAPACITY
AS ASSISTANT ADMINISTRATOR FOR
WATER AND HAZARDOUS MATERIALS,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

AMERICAN IRON AND STEEL INSTITUTE,
UNION CARBIDE CORPORATION,
FMC CORPORATION,
DOW CHEMICAL COMPANY,
CELANESE COMPANY,
E.I. DU PONT DE NEMOURS AND COMPANY,
EXXON CORPORATION,
MONSANTO CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
AMERICAN MINING CONGRESS,
Appellants

Civil Action No. 73-02153

No. 82-1367

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
A NON-PROFIT NEW YORK CORPORATION, ET AL.

v.

ANNE M. GORSUCH, AS ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

AMERICAN IRON AND STEEL INSTITUTE,
UNION CARBIDE CORPORATION,
FMC CORPORATION,
DOW CHEMICAL COMPANY,
CELANESE COMPANY,

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E.I. DU PONT DE NEMOURS AND COMPANY,
EXXON CORPORATION,
MONSANTO CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
AMERICAN MINING CONGRESS,
Appellants

Civil Action No. 75-00172

No. 82-1368

ENVIRONMENTAL DEFENSE FUND, INC.,
A NON-PROFIT NEW YORK CORPORATION, ET AL.

v.

ANNE M. GORSUCH, AS ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.
AMERICAN IRON AND STEEL INSTITUTE,
UNION CARBIDE CORPORATION,
FMC CORPORATION,
DOW CHEMICAL COMPANY,
CELANESE COMPANY,
E.I. DU PONT DE NEMOURS AND COMPANY,
EXXON CORPORATION,
MONSANTO CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
AMERICAN MINING CONGRESS,
Appellants

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Civil Action No. 73-02153

No. 82-1673

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
A NON-PROFIT NEW YORK CORPORATION, ET AL.

v.

ANNE M. GORSUCH, AS ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY
AMERICAN IRON AND STEEL INSTITUTE,
UNION CARBIDE CORPORATION,
FMC CORPORATION,
THE DOW CHEMICAL COMPANY,
CELANESE COMPANY,
E.I. DU PONT DE NEMOURS AND COMPANY,
EXXON CORPORATION,
MONSANTO CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
AMERICAN MINING CONGRESS,
Appellants

Civil Action No. 75-01267

No. 82-1674

NATURAL RESOURCES DEFENSE COUNCIL, INC.

v.

JAMES I. AGEE, IN HIS OFFICIAL CAPACITY
AS ASSISTANT ADMINISTRATOR FOR
WATER AND HAZARDOUS MATERIALS,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

AMERICAN IRON AND STEEL INSTITUTE,
UNION CARBIDE CORPORATION,
FMC CORPORATION,
THE DOW CHEMICAL COMPANY,
CELANESE COMPANY,
E.I. DU PONT DE NEMOURS AND COMPANY,

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EXXON CORPORATION,
MONSANTO CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
AMERICAN MINING CONGRESS,
Appellants

Civil Action No. 75-00172

No. 82-1675

ENVIRONMENTAL DEFENSE FUND, INC.,
A NON-PROFIT NEW YORK CORPORATION, ET AL.

v.

ANNE M. GORSUCH, AS ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY
AMERICAN IRON AND STEEL INSTITUTE,
UNION CARBIDE CORPORATION,
FMC CORPORATION,
THE DOW CHEMICAL COMPANY,
CELANESE COMPANY,
E.I. DU PONT DE NEMOURS AND COMPANY,
EXXON CORPORATION,
MONSANTO CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
AMERICAN MINING CONGRESS,
Appellants

Civil Action No. 75-01698

No. 82-1676

CITIZENS FOR A BETTER ENVIRONMENT, ET AL.

v.

ANNE M. GORSUCH, ADMINISTRATOR, U.S.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.
AMERICAN IRON AND STEEL INSTITUTE,
UNION CARBIDE CORPORATION,

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FMC CORPORATION,
THE DOW CHEMICAL COMPANY,
CELANESE COMPANY,
E.I. DU PONT DE NEMOURS AND COMPANY,
EXXON CORPORATION,
MONSANTO CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
AMERICAN MINING CONGRESS,
Appellants

Civil Action No. 73-02153

No. 82-1770

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

v.

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.
ALABAMA POWER COMPANY, ET AL.,
Appellants

Civil Action No. 75-01267

No. 82-1771

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

v.

JAMES I. AGEE, IN HIS OFFICIAL CAPACITY
AS ASSISTANT ADMINISTRATOR FOR
WATER AND HAZARDOUS MATERIALS,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.
ALABAMA POWER COMPANY, ET AL.,
Appellants

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Civil Action No. 75-01698

No. 82-1772

CITIZENS FOR A BETTER ENVIRONMENT, ET AL.

v.

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ALABAMA POWER COMPANY, ET AL.,
Appellants

Civil Action No. 75-00172

No. 82-1773

ENVIRONMENTAL DEFENSE FUND, INC.,
A NON-PROFIT NEW YORK CORPORATION, ET AL.

v.

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ALABAMA POWER COMPANY, ET AL.,
Appellants

[Filed October 4, 1983]

Appeals from the United States District Court
for the District of Columbia

Before: WILKEY and WALD, *Circuit Judges*, and
BONSAL,* *Senior District Judge* for the South-
ern District of New York

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court from which these appeals have been taken is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: October 4, 1983.

Opinion for the Court filed by Senior District Judge Bonsal.

Dissenting opinion filed by Circuit Judge Wilkey.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 75-01698

No. 82-1365

CITIZENS FOR A BETTER ENVIRONMENT
DENNIS L. ADAMCZYK

v.

ANNE GORSUCH, ADMINISTRATOR, U.S.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

AMERICAN IRON AND STEEL INSTITUTE,
UNION CARBIDE CORPORATION,
FMC CORPORATION,
DOW CHEMICAL COMPANY,
CELANESE COMPANY,
E.I. DU PONT DE NEMOURS AND COMPANY,
EXXON CORPORATION,
MONSANTO CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
AMERICAN MINING CONGRESS,
Appellants

And Consolidated Case Nos. 82-1366,
82-1367, 82-1368, 82-1673, 82-1674, 82-1675,
82-1676, 82-1770, 82-1771, 82-1772, 82-1773

[Filed November 18, 1983]

Before: WILKEY and WALD, *Circuit Judges* and BONSAI *,
Senior District Judge, U.S. District Court for
the Southern District of New York

* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

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ORDER

On consideration of the Petition for Rehearing of the American Iron and Steel Institute, et al., and Alabama Power Company, filed October 31, 1983, it is

ORDERED by the Court that the Petition is denied.

Per Curiam
For The Court:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Wilkey would grant the Petition for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 75-01698

No. 82-1365

CITIZENS FOR A BETTER ENVIRONMENT
DENNIS L. ADAMCZYK

v.

ANNE GORSUCH, ADMINISTRATOR, U.S.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

AMERICAN IRON AND STEEL INSTITUTE, ET AL.
Appellants

And Consolidated Case Nos. 82-1366,
82-1367, 82-1368, 82-1673, 82-1674, 82-1675,
82-1676, 82-1770, 82-1771, 82-1772, 82-1773

[Filed November 18, 1983]

Before: ROBINSON, *Chief Judge*; WRIGHT, TAMM, WIL-
KEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK,
SCALIA and STARR, *Circuit Judges*

ORDER

The Suggestion for Rehearing *En Banc* of the Ameri-
can Iron and Steel Institute, et al., and Alabama Power
Company has been circulated to the full Court. A ma-
jority of the Court has not voted in favor of the sugges-
tion. On consideration of the foregoing it is

ORDERED by the Court *en banc* that the suggestion for rehearing is denied.

Per Curiam

For The Court:

GEORGE A. FISHER

Clerk

By: /s/ Robert A. Bonner

ROBERT A. BONNER

Chief Deputy Clerk

Circuit Judges Wilkey, Scalia and Starr would grant rehearing *en banc* for the reasons set forth in Judge Wilkey's dissenting opinion.

Circuit Judges Wright, Tamm and Bork did not participate in this Order.

APPENDIX B

CONSTITUTION OF THE UNITED STATES

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and House of Representatives.

. . . .

ARTICLE II

Section 1. The executive Power shall be vested in a President of the United States of America. * * *

. . . .

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

. . . .

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which

shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * *

The pertinent provisions of the Clean Water Act, as amended, 33 U.S.C. §§ 1251-1357, are as follows:

Section 301 of the Act, 33 U.S.C. § 1311. Effluent limitations

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(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314 (d) (1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitations, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under this authority preserved by section 1370

of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2) (A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b) (2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b) (2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) [Repealed. Pub. L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.]

(C) not later than July 1, 1984, with respect to all toxic pollutants referred to in table 1 of

Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than three years after the date such limitations are established;

(E) not later than July 1, 1984, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than 3 years after the date such limitations are established, or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.

Section 302 of the Act, 33 U.S.C. § 1312. Water quality related effluent limitations

(a) Establishment

Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group

of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b) Notice; hearing; adjustment of limitation by Administrator

(1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this chapter) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter), such limitation shall not become

effective and the Administrator shall adjust such limitation as it applies to such person.

(c) Delay in application of other limitations

The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this title.

Section 303 of the Act, 33 U.S.C. § 1313. Water quality standards and implementation plans

(a) Existing water quality standards

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any state which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to

the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3) (A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate water shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if—

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new

water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be con-

sistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) Identification of areas with insufficient controls; maximum daily load

(1) (A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b) (1) (A) and section 1311(b) (1) (B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1) (A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a) (2) of this title as suitable for such calculation. Such

load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not

later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish, and wildlife.

(e) Continuing planning process

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not later than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning process which is consistent with this chapter. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this chapter. The Administrator shall not approve any State permit program under sub-

chapter IV of this chapter for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b) (1), section 1311(b) (2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste

treatment works required to meet the applicable requirements of sections 1311 and 1312 of this title;

(f) Earlier compliance

Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards

Water quality standards relating to heat shall be consistent with the requirements of section 1326 of this title.

(h) Thermal water quality standards

For the purposes of this chapter the term "water quality standards" includes thermal water quality standards.

Section 306 of the Act, 33 U.S.C. § 1316. National standards of performance

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflect the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term "source" means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a source.

(5) The term "construction" means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

(b) Categories of sources; Federal standards of performance for new sources

(1) (A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

- pulp and paper mills;
- paperboard, builders paper and board mills;
- meat product and rendering processing;
- dairy product processing;
- grain mills;
- canned and preserved fruits and vegetables processing;
- canned and preserved seafood processing;
- sugar processing;
- textile mills;
- cement manufacturing;

feedlots;
 electroplating;
 organic chemicals manufacturing;
 inorganic chemicals manufacturing;
 plastic and synthetic materials manufacturing;
 soap and detergent manufacturing;
 fertilizer manufacturing;
 petroleum refining;
 iron and steel manufacturing;
 nonferrous metals manufacturing;
 phosphate manufacturing;
 steam electric powerplants;
 ferroalloy manufacturing;
 leather tanning and finishing;
 glass and asbestos manufacturing;
 rubber processing; and
 timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator

shall take into consideration the cost of achieving such effluent reduction, and any non-water quality, environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) State enforcement of standards of performance

Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

(d) Protection from more stringent standards

Notwithstanding any other provision of this chapter, any point source the consideration of which is commenced after October 18, 1972, and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of title 26 whichever period ends first.

- (e) Illegality of operation of new sources in violation of applicable standards of performance

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

Section 307 of the Act, 33 U.S.C. § 1317. Toxic and pretreatment effluent standards

- (a) Toxic pollutant list; revision; hearing; promulgation of standards; effective date; consultation

(1) On and after December 27, 1977, the list of toxic pollutants or combination of pollutants subject to this chapter shall consist of those toxic pollutants listed in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives, and the Administrator shall publish, not later than the thirtieth day after December 27, 1977, that list. From time to time thereafter, the Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant. The Administrator in publishing any revised list, including the addition or removal of any pollutant from such list, shall take into account toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms. A determination of the Administrator under this paragraph shall be final except that if, on judicial review, such determination was based on arbitrary and capricious action of the Administrator, the Administrator shall make a redetermination.

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class only if such standard imposes more stringent requirements. Such published effluent standard (or prohibition) shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority. The Administrator shall allow a period of not less than sixty days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard. In addition, if within thirty days of publication of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith. Such a public hearing shall provide an opportunity for oral and written presentations, such cross-examination as the Administrator determines is appropriate on disputed issues of material fact, and the transcription of a verbatim record which shall be available to the public. After consideration of such comments and any information and material pre-

sented at any public hearing held on such proposed standard or prohibition, the Administrator shall promulgate such standard (or prohibition) with such modification as the Administrator finds are justified. Such promulgation by the Administrator shall be made within two hundred and seventy days after publication of proposed standard (or prohibition). Such standard (or prohibition) shall be final except that if, on judicial review, such standard was not based on substantial evidence, the Administrator shall promulgate a revised standard. Effluent limitations shall be established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title for every toxic pollutant referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives as soon as practicable after December 27, 1977, but no later than July 1, 1980. Such effluent limitations or effluent standards (or prohibitions) shall be established for every other toxic pollutant listed under paragraph (1) of this subsection as soon as practicable after it is so listed.

(3) Each such effluent standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such standard, but in no case, more than one year from the date of such promulgation. If the Administrator determines that compliance within one year from the date of promulgation is technologically infeasible for a category of sources, the Administrator may establish the effective date of the effluent standard (or prohibition) for such category at the earliest date upon which compliance can be feasibly attained by sources within such category, but in no event more than three years after the date of such promulgation.

(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

(b) Pretreatment standards; hearing; promulgation; compliance period; revision; application to State and local laws

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 1292 of this title) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreat-

ment standards under this subsection shall specify a time for compliance not to exceed three years from the date of promulgation and shall be established to prevent the discharge of any pollutant through treatment works (as defined in section 1292 of this title) which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works. If, in the case of any toxic pollutant under subsection (a) of this section introduced by a source into a publicly owned treatment works, the treatment by such works removes all or any part of such toxic pollutant and the discharge from such works does not violate that effluent limitation or standard which would be applicable to such toxic pollutant if it were discharged by such source other than through a publicly owned treatment works, and does not prevent sludge use or disposal by such works in accordance with section 1345 of this title, then the pretreatment requirements for the sources actually discharging such toxic pollutant into such publicly owned treatment works may be revised by the owner or operator of such works to reflect the removal of such toxic pollutant by such works.

(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternatives change, revise such standards following the procedure established by this subsection for promulgation of such standards.

(3) When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standard shall apply.

(4) Nothing in this subsection shall affect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection.

(c) New sources of pollutants into publicly owned treatment works

In order to insure that any source introducing pollutants into a publicly owned treatment works, which source would be a new source subject to section 1316 of this title if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 1316 of this title for the equivalent category of new sources. Such pretreatment standards shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

(d) Operation in violation of standards unlawful

After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

APPENDIX C

List of Petitioners' Subsidiaries And Affiliates
Pursuant To Supreme Court Rule 28.1

For Union Carbide Corporation :

ACM Services, Inc. (Texas)
 Administracion y Servicios Carmex S.A. de C.V.
 (Mexico)
 P. T. Agrocarb Indonesia (Indonesia)
 Agromore, Ltd. (India)
 Argon, S.A. (Spain)
 Arizona Welding Equipment Co. (Delaware)
 Beralt Tin and Wolfram Ltd. (U.K.)
 Calida Gas B.V. (Netherlands)
 Carbide Hashim Industrial Cases Co. Ltd.
 (Saudi Arabia)
 Chemos Industries Pty. Ltd. (Australia)
 Chrome Corporation (South Africa) (Pty) Ltd.
 (So. Africa)
 Cia National de Calcareaos & Derivados (Brazil)
 Dai Nippon Jushi Co. Ltd. (Japan)
 Delvan Pty. Ltd. (Australia)
 Elektrode Maatskafy van Suid Africa (Eiendoms)
 Beperk (So. Africa)
 Eletro Mangames Ltda. (Brazil)
 Eletrometalurgica Saudade Ltda. (Brazil)
 Empresa Brasileira de Reflorestamento e
 Agro-Pecuarla Ltda. (Brazil)
 Empresas Brasileira de Cilindros Ltda. (Brazil)
 Incarmex, S.A. de C.V. (Mexico)
 Indugas N.V. (Belgium)
 Joint Industries (Hycel) 1970 Ltd. (New Zealand)
 Karaj Road Property Co. Ltd. (Iran)
 P.T. Karmi Arafura Fisheries (Indonesia)
 La Littorale S.A. (France)
 Miami Welding Supply, Inc. (Florida)
 Nepal Battery Co. Ltd. (India)
 Nippon Unicar Co. (Japan)

Nitrofet, S.A. (Mexico)
 Oxigenio Edy S.A. (Brazil)
 Oxigenio del Norte, S.A. (Spain)
 Oy Unifos A.B. (Finland)
 Servicios Administrativos Carmex S.A. de C.V.
 (Mexico)
 Servicios Dyc. S.A. de C.V. (Mexico)
 Societe Civile Des Produits Lifine (France)
 Sony-Eveready Inc. (Japan)
 Tubatse Ferrochrome (Pty.) Ltd. (So Africa)
 Tubatse Mining and Quarrying (Pty.) Ltd.
 (South Africa)
 Ucar Plastics Ghana Ltd. (Ghana)
 Unifos Kemi A.B. (Sweden)
 Union Carbide Argentina S.A.I.C.S. (Argentina)
 Union Carbide Australia & New Zealand Ltd.
 (Australia)
 Union Carbide Australia Ltd. (Australia)
 Union Carbide Canada Ltd. (Canada)
 Union Carbide Ceylon Ltd. (Sri Lanka)
 Union Carbide Egypt S.A.E. (Egypt)
 Union Carbide France, S.A. (France)
 Union Carbide Ghana Ltd. (Ghana)
 Union Carbide India Ltd. (India)
 Union Carbide Kenya Ltd. (Kenya)
 Union Carbide Malaysia Sdn. Bhd. (Malaysia)
 Union Carbide Mexicana, S.A. (Mexico)
 Union Carbide New Zealand Ltd. (Australia)
 Union Carbide Nigeria Ltd. (Nigeria)
 Union Carbide Pakistan Ltd. (Pakistan)
 Union Carbide Sudan Ltd. (Sudan)
 Union Carbide Yemen Ltd. (Yemen, Arab Republic)
 Union Gas Co. Ltd. (Republic of So. Korea)
 Union Polymers Sdn. Bhd. (Malaysia)
 Union Showa K.K. (Japan)
 United States Welding, Inc. (Colorado)
 V.B. Anderson Co. (California)
 VBA Cryogenics Corporation (California)
 S.A. White Martins (Brazil)
 S.A. White Martins Nordeste (Brazil)

For FMC Corporation:

Asia Pacific Agricultural Development Corporation
 Asociacion Experimental Agricola (AEA)
 Ataka Construction & Engineering Co., Ltd.
 Avicon, Inc.
 Basse Sambre, E.R.I., S.A. Etudes et Recherches
 Industrielles
 British Cardboard Box Machine Co., Ltd.
 CBV—Industria Mechanica, S.A.
 Chlor-Chem Limited
 Coproqui—Comercial e Industrial de Productos
 Quimicos S.A.
 Electro Quimica Mexicana, S.A. de C.V.
 Eucheuma Development Philippines, Inc.
 Fabricacion Maquinaria y Cerras, S.A. de C.V.
 Fazenda Candiru S.A.
 Filsan Argentina, S.A.
 Filsan-Servicos E Empreendimentos S/C. Ltda.
 FMC Ag-Chem Thai Limited
 FMC Agroquimica de Mexico, S. de R.L. de C.V.
 FMC, Argentina, Sociedad Anonyma Comercial,
 Industrial, y Financiera
 FMC do Basil S.A. Industria e Comercio
 FMC Developments N.V.
 FMC Europe, N.V.
 FMC Europe, S.A.
 FMC Food Machinery Europe S.A.
 FMC Food Machinery France S.A.
 FMC Food Machinery Italy S.p.A.
 FMC—Foret, Compania Colectiva
 FMC Gabon S.A.R.L.
 FMC Guatemala, S.A.
 FMC (Ireland) Limited
 FMC Machinery (Germany) GmbH
 FMC de mexico, S.A. de C.V.
 FMC Packaging Machinery Europe N.V.
 FMC Saudi Arabia Limited
 FMC—Servicos e Empreendimentos S/C. Ltda.
 FMC Spain S.A.

FMC Wellhead de Venezuela, S.A.
 Foret, S.A.
 Foret Arif Libanaise, S.A.R.L.
 Huron Forge and Machine Company
 IMRX Corporation
 Jamex, S.A.
 Manufacturas Industriales, C.A. ("Maninca")
 Marine Colloids Limited
 Marine Colloids (Philippines) Inc.
 Mid-Atlantic Acceptance Company Limited
 Minera Baucarit S.A. de C.V.
 Mojonnier de Mexico
 Mojonnier Industria de Maquinas S.A.
 "Perorsa"—Peroxidos Organicos, S.A.
 Philippine Marine Products, Inc.
 Sibelco Espanola, S.A.
 Tarnos Instalaciones Industriales, S.A.
 Tarnos, S.A.
 Tokai Electro-Chemical Company, Limited (Tokai
 Denka Kogyo Kabushiki Kaisha)
 Tripoliven, C.A.
 Turegano, S.A.

For Monsanto Company:

ACM Services, Inc.
 Biogen, N.V.
 Collagen Corporation
 Soperton Gum Market, Inc.

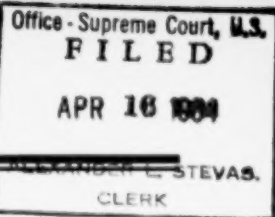
For Exxon Corporation:

The following subsidiaries and affiliates have stock or debt securities which are publicly traded in the United States or Canada:

Exxon Pipeline Company
 Imperial Oil Limited
 Reliance Electric Company

For American Mining Congress, American Iron and Steel Institute, and American Petroleum Institute:

None



No. 83-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNION CARBIDE CORPORATION, *et al.*
Petitioners,

v.

WILLIAM RUCKELSHAUS
AS ADMINISTRATOR, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*
Respondents,

**On Petition for a Writ of Certiorari
to the United States Court of Appeals for
the District of Columbia Circuit**

**BRIEF FOR RESPONDENTS NATURAL RESOURCES
DEFENSE COUNCIL, *et al.*, IN OPPOSITION**

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April 16, 1984

QUESTIONS PRESENTED

1. Whether some, but not all, of the provisions of a Consent Decree, voluntarily negotiated by the Environmental Protection Agency and subsequently endorsed by Congress, improperly limit the discretion of the Agency.
2. Whether Congress, in endorsing the strategy of the Consent Decree and codifying certain of its provisions, intended to supplant the Decree.
3. Whether some portions of the four causes of action underlying the Consent Decree were rendered moot by subsequent legislation and administrative actions.

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IN THE
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OCTOBER TERM, 1983

No. 83-1345

UNION CARBIDE CORPORATION,
FMC CORPORATION,
MONSANTO COMPANY,
EXXON CORPORATION,
AMERICAN MINING CONGRESS,
AMERICAN IRON & STEEL INSTITUTE,
AND AMERICAN PETROLEUM INSTITUTE,
Petitioners,

v.

WILLIAM RUCKELSHAUS
AS ADMINISTRATOR, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
NATURAL RESOURCES DEFENSE COUNCIL, INC.,
ENVIRONMENTAL DEFENSE FUND, INC.
NATIONAL AUDUBON SOCIETY,
CITIZENS FOR A BETTER ENVIRONMENT,
AND BUSINESSMEN FOR THE PUBLIC INTEREST, INC.,
Respondents,

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

**BRIEF FOR RESPONDENTS NATURAL RESOURCES
DEFENSE COUNCIL, *et al.*, IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals dated October 4, 1983 (Pet. App. 1a) is reported at 718 F.2d 1117. The corresponding opinions of the district court dated February

5, 1982 and May 7, 1982 (Pet. App. 103a, 117a) were unofficially reported at 16 Env't Rep. Cas. (BNA) 2084 and 17 Env't Rep. Cas. (BNA) 2013, respectively. The opinion of the court of appeals dated September 16, 1980 (Pet. App. 45a) is reported at 636 F.2d 1229. The corresponding opinion of the district court dated March 9, 1979 (Pet. App. 121a) was unofficially reported at 12 Env't Rep. Cas. (BNA) 1833.

JURISDICTION

The jurisdiction of the Court lies pursuant to 28 U.S.C. § 1254(1).

STATEMENT

1. The Complaints and the Consent Decree.

The Consent Decree at issue here emerged from four lawsuits by environmental groups which challenged two aspects of EPA's conduct under the Clean Water Act: the Agency's failure to meet specific deadlines and mandatory duties for regulating toxic and other pollutants; and also the manner in which the Agency exercised its discretion under the Act. For example, Section 307(a) of the Act required EPA to issue a list of toxic pollutants based on rather detailed statutory criteria.¹ Among other things, NRDC's complaint alleged that EPA had abused its discretion by ignoring several of the specific statutory criteria, and by applying irrelevant factors and criteria not found in the Act. Similarly, Section 307(b) established criteria² for determining which pollutants would require pretreatment before so-called "indirect discharges" would be allowed into municipal sewage works. NRDC's complaint in this phase of the case also charged that

¹ In issuing the list, EPA "shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the organisms and the nature and extent of the effect of the toxic pollutant on such organisms." 33 U.S.C. (& Supp. V) § 1317(a)

² Regulation was required for any pollutant which is not "susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works," or which "interferes with, passes through, or otherwise is incompatible with such works." 33 U.S.C. (& Supp. V) § 1317(b)(1).

EPA had failed to regulate all pollutants required by these statutory criteria.

Accordingly, the Consent Decree as negotiated by the parties³ and entered by the District Court addressed not only the mandatory duties that EPA had ignored, such as strict deadlines, but also EPA's failure to apply properly the criteria set forth in Sections 307(a) and 307(b) of the Act. The Decree first established the deadlines by which EPA was required to promulgate the mandated regulations.⁴ In order to resolve the dispute over EPA's application of criteria, the parties agreed to procedures and studies⁵ that would assist the Agency in applying the statutory criteria without abusing its discretion. And the parties also agreed that if the appropriate criteria were applied correctly, a specific list of toxic pollutants, discharged by specific industries, would be subject to regulation.⁶

Because the original complaints focused on the correct statutory criteria and on how the Agency exercised its discretion in applying those criteria, no party, including the Industry petitioners here, objected to the Decree as impermissibly infringing the Agency's discretion. Like Petitioners, the District Court was not concerned that the Decree included criteria, as well as related studies to assist in their application, since this was the core of the dispute. The Court was concerned that certain provisions of the proposed settlement might require it to review decisions clearly within the Agency's allowable zone of discretion, and therefore required a modification to the Decree so that it would not "be put in a position

³ The impetus for a negotiated settlement came from EPA on the basis of a policy decision that toxic pollutants were best regulated by technology, rather than health, based standards. NRDC was asked to forego its right to more stringent health based standards in return for the technology based standards developed in accordance with the procedures set forth in the Decree. 636 F.2d at 1234-1236 (Pet. App. 49a-52a).

⁴ Original Consent Decree, ¶¶ 7, 13, 14. (Pet. App. 164a, 171a-172a).

⁵ Paragraphs 4 and 12 of the Decree required EPA to conduct studies with defined study procedures. Paragraphs 4 and 12 did not dictate any particular regulatory action once the studies were concluded.

⁶ Original Consent Decree, ¶¶ 1, 2, 3, 4, 8, 10. (Pet. App. 160a-163a, 166a-169a).

of supervising the discretionary actions of the [Administrator] of the EPA" because "I don't think it is a proper judicial role." Tr. of Status Conference, 3-4 (April 30, 1976). (Appendix, *infra*).

After the District Court entered the Consent Decree over objections from Industry (which did not include the impermissible infringement issue), Industry did not appeal the merits of the Decree.⁷ Thereafter, EPA began to carry out its responsibilities, but by 1978 the Agency was in clear violation of the Decree's specific, objective provisions. It had fallen behind most of the deadlines imposed by the Decree, and had taken absolutely no steps toward creating the procedures and studies which would enable it to exercise its discretion in accordance with the criteria set forth in the Decree. EPA also had concluded by then that some aspects of the Decree, particularly Paragraph 8, were difficult to administer.

The parties resolved these problems by negotiating reasonable modifications to the settlement and submitting a revised Decree to the Court. For the most part, these modifications eased the requirements of the Decree. EPA obtained substantial extensions of the deadlines in Paragraph 7, and a *relaxation* of the criteria under Paragraph 8 for removing pollutants and segments of industry from regulation. EPA also received substantial extensions of its deadlines for completing the studies under Paragraphs 4, 11, and 12. But because EPA had done little under Paragraphs 4 and 12, they were modified to be somewhat more specific about the nature of the necessary studies. Like the original Decree, these modified provisions embodied EPA's preferred approach to meeting its responsibilities.

When the modifications were submitted to the District Court, once again Industry did not claim that the Decree as modified impermissibly infringed the discretion of the Agency.

⁷ Certain industrial concerns did appeal the District Court's denial of their application for intervention, which was subsequently reversed by the District of Columbia Circuit. *NRDC v. Costle*, 561 F.2d 904 (D.C. Cir. 1977).

Rather, the Decree was attacked as moot, as invalid rule-making by the Agency, and as superseded by the 1977 amendments to the Clean Water Act. The District Court rejected these arguments. (Pet. App. 123a-138a).

2. Court of Appeals Consideration of the Consent Decree.

Once again, Industry appealed, but only on the grounds raised in District Court. The Court of Appeals upheld the District Court with respect to all arguments directly raised. 636 F.2d 1229 (D.C. Cir. 1980) (Pet. App. 45a). Specifically, in ruling that the Decree had not been superseded by the 1977 amendments, the Court noted the strong Congressional sentiment that the Decree be retained to provide any missing elements necessary for a comprehensive toxic pollution control program. The Court's opinion referenced key legislative history which "approves and endorses this strategy" embodied in the Decree, and indicates that the 1977 amendments were "specifically designed to codify the so-called 'Flannery decision'." 636 F.2d at 1243-1245 (Pet. App. 65a-71a).

However, at oral argument the Court of Appeals *sua sponte* raised the question of impermissible infringement, and ultimately remanded the case to the District Court for further consideration of this issue. 636 F.2d at 1258-59 (Pet. App. 98a-100a).

After full briefing, the District Court ruled that the Decree did not impermissibly infringe the Agency's discretion. The Court noted that the relief granted was responsive to the alleged unlawful agency action, that the Agency gained substantial freedom to implement the Clean Water Act in the way it wanted in exchange for agreeing to the deadlines and studies in the Decree, and that considerable flexibility had been built into the Decree. (Pet. App. 109a-112a). The District Court also stressed that "the fact that Congress has placed its imprimatur on the procedures established by the instant settlement agreement provides substantial support for finding that this decree does not impermissibly infringe on the Administrator's discretion." (Pet. App. 113a).

Industry appealed, and the Court of Appeals affirmed. The Court agreed that "Congress implicitly sanctioned the limited infringement on the Agency's discretion which the Decree entails." 718 F.2d at 1129 (Pet. App. 28a). The Court also ruled that a "court's duty when passing on a settlement agreement is fundamentally different from its duty in trying a case on the merits." 718 F.2d at 1126 (Pet. App. 20a-21a). Thus, the trial court must determine that the decree is responsive to the violations alleged, consistent with the statute, fair, reasonable, and in the public interest. Additional inquiry could require a full-scale hearing on the merits. *Id.*

Moreover, according to the Court, the context of the Decree is important. The fact that the Decree was crafted primarily by EPA, and that no substantive result was foreordained, are factors which must be considered in evaluating whether an Agency's discretion is impermissibly infringed.

Judge Wilkey dissented. The premise for his view was his conclusion that the Decree "constrains the agency in two basic ways. It requires the agency to apply criteria not found in the Clean Water Act, and it requires the agency to undertake programs that differ in kind as well as scope from the duties imposed by the Act." 718 F.2d at 1131 (Pet. App. 33a).

3. EPA's Implementation of the Consent Decree.

EPA has met nearly all its responsibilities under the Decree. While implementation has not been entirely free of difficulty, the Agency has made steady progress toward completing its obligations. As of today, EPA has issued in final form 22 of the required industry-wide regulations. It has proposed six of the seven remaining regulations, and by the end of 1984, regulations for all categories except the Organic Chemicals industry are expected to be final.

On March 13, 1984, EPA released a report that summarized its activities and completed its obligations under Paragraph 4(c) of the Decree. *See* 49 Fed. Reg. 10357 (March 20, 1984). The report identifies six additional compounds that meet the criteria in Section 307(b) of the Act ("incompatible" with municipal works), and contains EPA's pledge to undertake regulatory actions according to a reasonable schedule.

By 1982, EPA had issued all but one of the water quality criteria required by Paragraph 11. The final water quality criterion was issued on February 2, 1984 (49 Fed. Reg. 5831 (February 15, 1984)), completing EPA's obligations under Paragraph 11.

As to Paragraph 12, on July 27, 1981, EPA completed initial identification of water bodies in 34 metropolitan areas that were believed to be seriously contaminated by discharges of toxic pollutants, and on February 3, 1982, set forth a strategy for developing additional controls to protect water quality. U.S. EPA, Paragraph 12 Strategy (February 3, 1982). NRDC initially was concerned that EPA's activities under Paragraph 12 did not comply with the Decree because the strategy only encouraged, but did not require, remedial actions. However, a subsequent EPA regulatory action has corrected this problem, so that the Agency now has completed all its commitments under Paragraph 12. 48 Fed. Reg. 51407 (November 8, 1983).

Likewise, the Agency has all but completed its use of the deletion criteria in Paragraph 8. EPA announces its decisions to delete pollutants and industrial subcategories pursuant to Paragraph 8 at the time it issues proposed regulations under Paragraph 7. As noted above, only one regulation remains to be proposed; EPA will complete this task by the end of April, 1984. To date, the Agency has deleted from regulation 10 entire industrial categories, over 100 subcategories, and dozens of pollutants. Not one of these decisions has been challenged in the District Court as inconsistent with the requirements of Paragraph 8.

In sum, all that remains to be implemented is the issuance of final regulations for six industrial categories, and the proposal and promulgation of regulations for one category, as required by Paragraph 7.

REASONS FOR DENYING THE PETITION

This case is of scant importance to anyone, even Petitioners, because the Consent Decree under attack has little

current effect.⁸ EPA has fulfilled almost all its obligations under the Decree, and those few that are outstanding probably will be accomplished before the Court can complete its review of the Court of Appeals decision.

Furthermore, the broad issues raised by the Petition should not be reached by the Court, even if review were granted, because 1977 Congressional action sanctioned the controverted provisions of the Decree and the manner in which EPA has been implementing them.

In any event, this case is not properly resolved by expounding the broad principles advanced by the Petition and set forth in Judge Wilkey's dissent. Rather, even if those principles are correct, each specific provision of the Decree must be measured against the allowable zone of discretion permitted EPA under the Clean Water Act to determine if the allowable discretion has been infringed. Such detailed parsing of the Clean Water Act and the Consent Decree in the context of a settlement agreement resolving disputed allegations will produce only narrow interpretations of the Act that have been overtaken by the 1977 amendments and EPA's largely completed regulatory actions.

1. The Petition should be denied because the Consent Decree has little remaining vitality.

The Consent Decree has little current importance because it is essentially a dead letter. EPA has complied with the key provisions of concern to Industry and the dissent below (Paragraphs 4(c), 11, and 12). EPA also has applied the Paragraph 8 criteria in deleting pollutants and subcategories from regulation in all but one industry. All that remains is for EPA to propose one regulation and issue final regulations under the deadlines of Paragraph 7 for seven industries. All but one of these final regulations will be promulgated by year's end. Paragraph 7, of course, is not challenged by Petitioners.

⁸ Petitioners did not consider the discretion issue important enough to raise until identified by the Court of Appeals four years after the Decree was entered.

Consequently, if the petition were granted, the Court would review a husk.

2. Review of the broad separation of power issue proffered by the Petition is unnecessary because the 1977 amendments to the Clean Water Act approved the Decree.

There is no danger that the Decree narrows the zone of discretion Congress granted to EPA. Petitioners' separation of power argument is bottomed on the notion that the courts may not constrain an agency's discretion beyond the limits imposed by Congress. (Pet. 20). Here, Congress has examined the Consent Decree, and has approved and codified it in the 1977 amendments to the Clean Water Act.

Both the District Court and the Court of Appeals below found support in Congress' 1977 amendments for their view that the Consent Decree did not limit EPA's discretion beyond the limits intended by Congress. (Pet. App. 28a, 112a). In amending the Clean Water Act in 1977, Congress shifted its focus to the mounting problems posed by toxic pollutants.⁹ The Consent Decree itself had been a pivotal development with respect to toxics between passage of the Act in 1972, and Congress' reconsideration of that Act in 1977. Legislative consideration of toxic pollutants therefore centered on the Consent Decree.¹⁰

Congress quite simply adopted the strategy of the Consent Decree. It amended Section 307(a) to require that EPA issue the list of toxic pollutants set forth in Appendix A to the Decree, and to codify EPA's duty to control toxic pollutants through the technology based regulations of the Decree rather than health based standards. Significantly, as the Court of Appeals noted, the legislative history indicates that "Congress expected the settlement agreement to continue in effect." 636 F.2d at 1244 (Pet. App. 70a).

⁹ See *A Legislative History of the Clean Water Act of 1977*, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess. 325, 334 (1978) [hereinafter cited as 1977 *Legis. Hist.*]

¹⁰ See Remarks of Cong. Roberts in support of the Conference Report, 1977 *Legis. Hist.*, *supra* at 327; Sen. Rept., 1977 *Legis. Hist.*, *supra* at 689.

Senator Muskie, the architect of the 1972 legislation and the Senate Floor Manager of the Conference Report in 1977, stressed that the amendments were "specifically designed to codify the so-called 'Flannery decision.'" 1977 *Legis. Hist.*, *supra* at 455. The Senate Report stated that the "Committee approves and endorses this strategy." *Id.* at 689. Even Congressman Roberts, who is cited by Petitioners for support (Pet. 8-9), assumed during the floor debates that the Decree's Paragraph 8 criteria would remain in place. *Id.* at 328.

Congress would not have endorsed the limits in the Decree, and at the same time intended that EPA have discretion to ignore them.

3. Review of the District Court's power to enter the Consent Decree will yield an extremely narrow decision even if the Court reaches the issues proffered by petitioners.

Petitioners do not attack the entire Consent Decree. On appeal, petitioners conceded that the provisions of the Decree which established deadlines and priorities for issuing regulations called for by the Clean Water Act were a proper exercise of the District Court's judicial power. 718 F.2d at 1122 (Pet. App. 12a-13a). Rather, Petitioners seek a modification of those parts of the Decree which they claim impermissibly infringe EPA's discretion.

The problem posed for this Court in such a review is plain from Petitioners' formulation of the principles they invoke. Petitioners contend that the Article III "case and controversy" limitation "precludes a court from embodying in a judicial decree a settlement agreement that goes beyond the actual legal dispute between the parties," and that "a court's power to adopt a consent decree derives from, and is limited by, the terms of the statute that the decree seeks to enforce." (Pet. 19-20). Further, Petitioners urge that the Supremacy Clause prevents a court from telling the Executive Branch how to exercise its discretion. (Pet. 21).

The application of these principles, of course, requires a detailed analysis of the legal and factual disputes between the parties in four separate lawsuits, as well as a close study of

the criteria imposed by the statute and the zone within which Congress intended EPA to exercise its discretion.¹¹ This Court has long taught that Congress rarely grants the Executive Branch unfettered, unreviewable discretion, and that generally there is law to apply in reviewing the exercise of discretion. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1972). The law to apply is derived from the governing statute, and operates as a restraint on the exercise of administrative discretion. 401 U.S. at 402.

Petitioners sidestep this problem by claiming that "everyone involved in this litigation has acknowledged that substantial portions of the Consent Decree constrain the statutorily-conferred regulatory discretion of an Administrator of EPA." (Pet. 18). But this is not the case. The catch phrase in the above quotation is "statutorily conferred." An important part of the underlying controversy involved just *how much discretion Congress actually conferred* upon EPA in the Clean Water Act.

The complaints in these consolidated cases charged that, among other things, the Agency had abused its discretion and wandered beyond the zone of allowable discretion by applying unlawful criteria and by failing to apply required statutory criteria. (See Complaint, No. 2173 p. 13). Indeed, when NRDC

¹¹ The dissent's description of what the Act requires is too facile. 718 F.2d at 1132 (Pet. App. 33a-35a). For example, the Decree repeats, but does not add to or subtract from, the statutory factors Congress specified for EPA's use in regulating the discharge of toxic pollutants under Sections 301, 304 and 306. See Decree, 1-3. The complaints in Nos. 2153-73 and 75-0172 alleged that EPA has no discretion not to regulate a pollutant if it is in fact toxic and belongs on the list of toxic pollutants. Paragraph 8 of the Decree amounted to a concession on NRDC's part by specifying when EPA may choose not to regulate. Thus, Paragraph 8 represents a compromise of an issue raised by the complaints as to the allowable zone of EPA's discretion under the Act.

Similarly, Section 307(b) requires EPA to regulate all pollutants that are incompatible with municipal treatment works. The complaint in No. 75-0287 alleged that EPA must regulate all such incompatible pollutants by a date certain. Paragraph 4(e) simply requires a study to determine which pollutants meet this requirement.

filed its first legal memorandum on the merits of the case, it said: "The question of the Administrator's discretion is at the heart of this case—where discretion does exist and where it is circumscribed and hence reviewable."¹²

In essence, NRDC claimed that EPA applied the wrong statutory criteria and did not exercise its discretion properly. EPA claimed the opposite. A classic settlement followed where the parties agreed on the appropriate criteria and an appropriate way to guide EPA's exercise of discretion within the authority provided by the Act.¹³

If a court had no power to enter such a settlement, it would surely chill the judicial policy favoring settlement in any case where the alleged law violations include an abuse of discretion. Indeed, under Petitioners' view, the District Court must in every instance determine if the relief provided in the settlement fits precisely with what Congress had in mind, rather than make a more general finding that the settlement is consistent with the objectives of the statute and in the public interest.

Viewed in this light, the Court of Appeals decision is entirely consistent with principles enumerated by this Court in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) and *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961). In *Vermont Yankee*, this Court reversed a lower court ruling which had imposed extra-statutory procedures

¹² *NRDC v. Train*, No. 2153-73, Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Dismiss or, in The Alternative, For Summary Judgment, p. 16 (April 1, 1974).

¹³ By agreeing to Paragraphs 4(c) and 12, EPA undertook only to conduct studies, with no precise regulatory result required, so as to overcome the gaps in EPA's knowledge that had caused the original statutory violations. Nowhere do Petitioners assert that an agency should be thwarted from settling charges that it has violated substantive provisions of a statute by agreeing simply to conduct studies of pertinent problems and take appropriate actions based on the results of those studies. The Decree does not prevent EPA from conducting additional studies, as the modified Decree specifically provided that it could not be "construed to limit the Administrator's right to exercise any statutory authority he may have at any time. . . ." (Pet. App. 148a).

on the Nuclear Regulatory Commission *despite the fact* that there was "no doubt" NRC had complied with the only statute governing its procedural obligations. 435 U.S. at 549. That does not remotely resemble this case, where EPA resolved a substantial dispute over the statutory criteria and the statutory limits on its discretion by entering a settlement which set forth appropriate criteria and limits.

While *System Federation*, unlike *Vermont Yankee*, involved a consent decree, its principles also are consistent with the holding below. There, Congress had eliminated the statutory provision which had supported the requirement of a consent decree, thereby making it necessary for the decree to be modified. 364 U.S. at 644.¹⁴ Here, by contrast, there has been no elimination of statutory provisions on which the Decree was based. Instead, Congress has specifically approved and endorsed the provisions of the Decree. The Consent Decree therefore not only conforms to the precept in *System Federation* that a settlement must be "in furtherance of the statutory objectives," *Id.* at 651, but also carries out the specific intentions of Congress.

Thus, this Consent Decree cannot be overturned simply by invoking the principles of *Vermont Yankee* and *System Federation*. Rather, the Court must laboriously parse provisions of the Clean Water Act and its history, the complaints in the case, and the individual provisions of the Decree to determine if the Administrator's discretion is in any way constrained beyond what was intended by Congress. In the context of this case, such a detailed review is more properly left to the lower courts.

4. The Circuit Court's 1980 ruling should not be reviewed.

Petitioners also seek review of the 1980 ruling of the Court of Appeals. 636 F.2d 1229 (Pet. App. 45a). That decision

¹⁴ Decrees retain inherent flexibility, since Courts must be prepared to modify them "as events shape the need." *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). Here, the District Court has been receptive to such events, twice modifying the Decree on EPA's request. 718 F.2d at 1130 (Pet. App. 29a).

held that the 1977 amendments to the Clean Water Act were not intended by Congress to supersede the Consent Decree, and that the Decree was not moot because parts of the original proceedings remained live controversies.

Petitioners themselves do not take seriously their request for review of the 1980 ruling. They devote a single paragraph to a description of the 1980 decision, and conclude with the totally unsupported assertion that "these rulings are erroneous and deserve review by this Court because of the considerable continuing effect of the decree on the Agency's regulatory actions under the Clean Water Act." (Pet. 27).

For the reasons stated in Part I above, the Consent Decree now has a small and diminishing effect on the Agency's implementation of the Clean Water Act. Petitioners do not show the contrary. Moreover, the 1980 ruling has virtually no ongoing significance in itself. That decision involved issues relating only to the application of the 1977 amendments and the mootness doctrine to this particular Consent Decree. These narrow issues can never resurface.

CONCLUSION

The petition for a writ of certiorari should be denied.

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April 16, 1984

APPENDIX

**Transcript of Status Conference Before United States District
Judge Thomas A. Flannery, April 30, 1976**

* * * * *

Now, with respect to the proposed settlement agreement I have carefully reviewed it and I have carefully read the various comments and objections that have been filed by the intervenor and other parties permitted to comment and this Court is not prepared to approve the settlement in its present form.

Specifically with reference to paragraph 8(c), page 12 of the proposed Settlement Agreement, which provides that whenever the administrator decides to exclude a point source category or a specific pollutant from coverage pursuant to this specific agreement he shall promptly file with the Court and serve the parties to the captioned cases, designating the point source category, sub-category or specific pollutant to be excluded together with the reasons therefor. If the plaintiffs file objections to the proposed exclusion, the Court shall determine whether such exclusion shall be permitted under the criteria previously enunciated in (a) and (b) of this particular section.

Now, that as I view it, would put the Court in a position of supervising the discretionary actions of the director of the EPA until conceivably 1983 or beyond. I don't intend to undertake any such role, and I don't think it is a proper judicial role.

And, therefore, I just won't approve of that.

* * * * *

No. 83-1345

Office - Supreme Court, U.S.

FILED

MAY 8 1984

ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNION CARBIDE CORPORATION, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in denying motions to vacate or modify a consent decree originally entered into by the Environmental Protection Agency eight years ago.

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**BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals dated October 4, 1983 (Pet. App. 1a-44a), is reported at 718 F.2d 1117. The corresponding opinions of the district court (Pet. App. 103a-114a and 117a-120a) are reported unofficially at 16 Env't Rep. Cas. (BNA) 2084, and 17 Env't Rep. Cas. (BNA) 2013, respectively. The opinion of the court of appeals dated September 16, 1980 (46a-100a), is reported at 636 F.2d 1229. The corresponding opinion of the district court, dated March 9, 1979 (Pet. App. 121a-138a), is reported unofficially at 12 Env't Rep. Cas. (BNA) 1833.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1983 (Pet. App. 195a-202a). A petition for rehearing and suggestion for rehearing en banc was denied on November 18, 1983 (Pet. App. 203a-204a, 205a-206a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a consent decree originally approved and entered by the district court in 1976 in settlement of four lawsuits brought by the Natural Resources Defense Council, Inc., et al. (NRDC) against various officials of the Environmental Protection Agency (EPA). The suits concerned EPA's alleged failure to implement Sections 307(a) and 307(b) of the Federal Water Pollution Control Act as then in effect, 33 U.S.C. (1976 ed.) 1317(a) and 1317(b). As enacted in 1972, Section 307(a) directed the Administrator of EPA, within 90 days after enactment, to publish a list of toxic pollutants based upon several criteria, including toxicity, persistence, and degradability of the pollutant. Within 180 days thereafter, he was directed to propose effluent standards for each pollutant based upon the same factors, and within six months thereafter, he was to promulgate final effluent standards. Section 307(b) of the Act required the Administrator, within 180 days after enactment, to propose pretreatment standards "for introduction of pollutants into [publicly-owned treatment works] * * * for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works." Within 90 days after proposal, he was di-

rected to promulgate final pretreatment standards for such pollutants. *Ibid.* These pretreatment standards were to apply to industrial categories. 33 U.S.C. (1976 ed.) 1317(c).

In one suit, NRDC claimed that EPA's criteria for identifying toxic pollutants under Section 307(a) of the Act were too restrictive, and that EPA had unlawfully failed to list some 25 pollutants.¹ In two other suits, NRDC alleged that EPA had failed to perform a mandatory duty under Section 307(a) to promulgate final health-based effluent standards within the time required by the Act for nine pollutants which the Agency had listed as toxic.² In the fourth suit, NRDC alleged that EPA had failed to promulgate pretreatment standards within the time required by Section 307(b).³

NRDC and EPA ultimately negotiated a settlement of these cases. The primary feature of this agreement—paragraph 7 of the decree—allowed EPA to regulate toxic pollutants and establish pretreatment standards on an industry-by-industry basis, using the technology-based criteria found in Sections 301(b) (2)(A) and 306 of the Act, 33 U.S.C. 1311(b) (2)(A) and 1316.⁴ EPA preferred this approach to the health-based, pollutant-by-pollutant method appar-

¹ *NRDC v. Train*, No. 2153-73 (D.D.C. filed Dec. 7, 1973).

² *Environmental Defense Fund v. Train*, No. 75-0172 (D.D.C. filed Feb. 6, 1975); *Citizens for a Better Environment v. Train*, No. 75-1698 (D.D.C. filed Oct. 15, 1975).

³ *NRDC v. Agee*, No. 75-1267 (D.D.C. filed Aug. 4, 1975).

⁴ Section 301(b) (2)(A) requires existing point source dischargers to comply with "best available technology economically achievable" (BAT) by July 1, 1984. Section 306 requires new point source dischargers to comply with "best available demonstrated control technology" (BADT).

ently envisioned by Section 307(a). Paragraph 7 also set forth a mutually acceptable timetable for promulgating these regulations (Pet. App. 164a). Appendix A to the decree identified the pollutants, and Appendix B identified the industrial categories, which were to be the focus of EPA's inquiry under paragraph 7 (Pet. App. 177a-194a).⁶ However, under the criteria set out in paragraph 8 of the decree,⁷ EPA could exclude from such regulations any listed pollutant or industrial category (*id.* at 166a). The provisions of paragraph 7, though the most important at the time, are not challenged by petitioners here. See Pet. App. 12a-13a n.7.

In addition, the decree included several provisions, the principal subjects of the instant dispute, that committed EPA to follow certain procedures and criteria in deciding whether to undertake additional regulatory measures. None of these provisions bound the Agency to particular substantive outcomes; however, they have guided the Agency's approach to the development of regulations under the Act. Paragraph 4(a) requires EPA to set pretreatment standards for certain pollutants, not listed in the decree, which meet the statutory criteria for pretreatment regulation (Pet. App. 162a-163a). Paragraphs 4(b) and 4(c)⁷ direct the Agency to "identify" industrial categories that discharge certain pollutants, as well as other

⁶ In addition, under paragraph 13 of the decree (Pet. App. 171a), EPA was to promulgate pretreatment standards for eight industrial categories according to the "best practicable control technology currently available" (BPT), found in Section 301(b) (1) (A) of the Act, 33 U.S.C. 1311(b) (1) (A).

⁷ The criteria of paragraph 8 are more detailed and specific than the statutory criteria of Section 307(a) (1), 33 U.S.C. 1317(a) (1).

⁸ Paragraph 4(c) was added to the decree in 1979.

pollutants warranting controls (Pet. App. 141a-142a, 163a). The process specified in paragraph 4(c) is not explicitly required (though it is certainly permitted) by the Act. Paragraph 4(c) also requires that EPA undertake regulatory action at the completion of this "identification" process (Pet. App. 141a-142a). Paragraph 8 of the decree contains criteria, not explicitly set out in the statute, for exclusion of industrial categories and pollutants covered by the decree from regulation (Pet. App. 166a-168a, 147a-148a). Paragraph 12 of the decree requires EPA to establish a program under specified procedures not required by the Act, to determine whether regulations more stringent than the paragraph 7 technology-based regulations were necessary to ensure the maintenance of specified uses for receiving waters (Pet. App. 170a).⁸

NRDC and EPA jointly presented the agreement to the court for approval. After considering objections to the decree raised by several petitioners and other industry-intervenors,⁹ the district court entered an order on June 9, 1976, approving the agreement and directing EPA to comply with its terms (Pet. App. 149a-156a). Prior to approving the decree, however, the court required changes in the agreement to ensure that it would not be called upon to "review substantive judgments made by the Administrator * * * but will merely ensure good faith compliance with the provisions of the agreement" (Pet. App.

⁸ Paragraph 12 was substantially modified in 1979 to make its requirements more specific and detailed. See Pet. App. 147a-148a.

⁹ Although not all of the industry intervenors are currently petitioners in this Court, we will refer to them collectively, for convenience, as "petitioners."

151a). The court found that the decree as so modified constituted a "classic settlement" of the parties' disputes (Pet. App. 154a) and a "just, fair and equitable resolution of the issues raised * * *" (Pet. App. 156a). No appeal was taken from this order.

2. By 1976, EPA had encountered unforeseen difficulties in meeting some of the deadlines set forth in the decree. NRDC therefore moved for an order holding EPA in contempt for failing to comply with the decree. In response, EPA moved to modify the decree by, *inter alia*, obtaining more time to promulgate technology-based regulations under paragraph 7 of the decree and expanding the criteria by which it could exclude pollutants and industries from regulation under paragraph 8. Petitioners moved to vacate the decree on the grounds that: (1) the 1977 Amendments to the Act supplanted the decree or rendered the underlying litigation moot; and (2) the decree circumvented applicable public notice and comment requirements.

Thereafter, NRDC and EPA settled their pending motions by agreeing to and proposing to the court certain modifications of the original decree. The primary modifications extended the deadlines for promulgating paragraph 7 regulations, as requested by EPA (Pet. App. 142a-143a); expanded the criteria by which EPA could exclude pollutants and industrial categories from regulations, as requested by EPA (*id.* 143a-146a); and set forth a more detailed procedure for the Agency to follow in deciding whether to undertake additional rulemakings under paragraphs 4 and 12 (*id.* 141a and 147a). On March 9, 1979, the district court entered an order modifying the decree as requested by NRDC and EPA, and denying petitioners' motion to vacate (Pet. App. 121a).

3. Petitioners appealed that order to the court of appeals. The court of appeals affirmed the district court judgment with respect to each of petitioners' explicit contentions, but it remanded the case to the district court to determine whether the consent decree impermissibly infringed on the Administrator's discretion in implementing the Clean Water Act (Pét. App. 99a-100a).

On remand, petitioners filed a motion to vacate or, alternatively, to revise the decree on the "impermissible infringement" grounds suggested by the court of appeals. Both EPA and NRDC opposed petitioners' motion, contending that the decree did not impermissibly constrain the Agency's discretion. EPA also filed a cross-motion to modify the decree, contending that circumstances had changed sufficiently since the decree was last modified that further modifications were warranted. See Defendants' Memorandum in Opposition to Intervenor's Joint Motion to Vacate or, Alternatively, to Revise the Decree and in Support of Defendants' Cross-Motion to Modify the Decree at 26 (hereinafter "Defendants' Memorandum"). The Agency sought (1) further extensions of the paragraph 7 timetables for proposing and promulgating technology-based regulations and (2) deletion of the provisions of the decree that were not expressly mandated by the Act but were within the Agency's discretion. NRDC opposed this motion.

Specifically, EPA, like petitioners, sought deletion of paragraphs 4(b), 4(c), 6, 7(c), 11, 12, 13, and 14 of the decree, and amendments to paragraphs 4(a), 7(a), 7(d), and 10. The respects in which EPA's requested relief differed from that of petitioners were that EPA would modify paragraph 8 to permit exclusion for reasons other than those listed and to per-

mit Federal Register publications of exclusions under the paragraph rather than affidavits, while petitioners would have deleted paragraph 8; and petitioners would have deleted paragraph 19—which is essentially a savings clause (Pet. App. 148a). See defendants' Memorandum at 32 n.24. Unlike petitioners, however, EPA did not attack the legality of the decree *ab initio*, but urged that changed circumstances justified its proposed modifications.¹⁰

By order of February 5, 1982, the district court denied petitioners' motion to modify the decree, holding that the decree did not impermissibly constrain the Agency's discretion (Pet. App. 103a). On May 7, 1982, the court denied EPA's cross-motion to modify, concluding that EPA had presented insufficient grounds for its request (Pet. App. 117a).

EPA subsequently filed a motion for reconsideration of the district court's May 7 order insofar as it denied EPA's request for more time to propose and promulgate technology-based regulations under paragraph 7 of the decree.¹¹ The Agency supported its request with more detailed and extensive evidence as to

¹⁰ EPA argued that "[e]xtra obligations not required by statute necessarily infringe on EPA's ability to allocate its limited resources in the way it finds best" (Defendants' Memorandum at 30) and that, in light of changed circumstances, a new Administrator, appointed after a change in presidential administrations, was entitled to allocate resources and make policy judgments within the discretion vested in the Administrator by statute (*ibid.*). During the period the cross-motion was pending in district court, EPA continued to carry out the terms of the decree.

¹¹ The court's May 7 order directed EPA to promulgate regulations for all remaining categories within one year.

the need for additional time. By order dated October 26, 1982, the district court granted this motion.¹²

4. Petitioners appealed the district court's denial of their motion to vacate and the denial of EPA's cross-motion to modify. EPA did not appeal the May 7 order denying its cross-motion, but opposed petitioners' position in the court of appeals.

The court of appeals affirmed on a divided vote (Pet. App. 1a-44a). The court rejected petitioners' contention that provisions not expressly mandated by statute, but within the Agency's discretion, could not properly be included in the decree. The court relied on *United States v. Armour & Co.*, 402 U.S. 673, 681-682 (1971), and *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975). See Pet. App. 17a-22a. The court also rejected petitioners' claim that these "nonstatutory" provisions of the decree impermissibly infringe on EPA's discretion in implementing the Act. The court noted that the decree had not only been consented to, but largely formulated by EPA, and that the provisions of the decree challenged by petitioners did not compel EPA to take any specific substantive action or prescribe the content of any final rule. The court also reaffirmed its earlier holding (Pet. App. 56a-71a), based on legislative history regarding the 1977 Amendments to the Act, that "Congress implicitly expected the settlement agreement to continue in effect," and considered this to be further support for its view that the decree does not impermissibly infringe on EPA's discretion under the Act (*id.* at 28a).

¹² On two subsequent occasions the district court has further extended the paragraph 7 schedules on EPA's request, by orders dated August 2, 1983, and January 6, 1984.

In dissent, Judge Wilkey stated that an Article III court cannot command an Executive Branch agency "to exercise its administrative discretion in a particular way * * *," and concluded that through the provisions of this consent decree, the court exceeded the bounds of its Article III authority by requiring EPA to apply decisionmaking criteria "not found in" the statute and to "undertake programs that are not required by the statute" (Pet. App. 32a-33a).

ARGUMENT

Petitioners seek an order vacating or substantially modifying a consent decree entered into by the Administrator of the Environmental Protection Agency in 1976, establishing a "detailed program for developing regulations to deal with the discharge of toxic pollutants" (Pet. App. 9a) under the Clean Water Act, 33 U.S.C. 1251 *et seq.* Petitioners contend that certain provisions of the decree—those not explicitly mandated by the Act—exceed the power of an Article III court by constricting the exercise of statutory discretion by the Administrator. Petitioners thus mount a broad-based challenge to the enforceability of consent decrees that purport to bind an executive branch official and his successors in office to exercise their discretion in a particular manner.¹⁸

¹⁸ Petitioners also challenge the court of appeals' 1980 holding (Pet. App. 56a-71a) that the 1977 Amendments to the Act did not supersede the consent decree. We do not consider this issue of sufficient importance to warrant this Court's review. It is essentially of importance to this lawsuit alone, was addressed comprehensively and responsibly by the court of appeals, and stands—for reasons discussed at pages 14-15, *infra*—soon to become moot.

The issue raised is of undoubted importance. See, e.g., *National Audubon Society v. Watt*, 678 F.2d 299 (D.C. Cir. 1982); *Ferrel v. Department of Housing & Urban Development*, appeal pending, No. 83-2038 (7th Cir.); *Alliance to End Repression v. Department of Justice*, appeal pending en banc, No. 83-1853 (7th Cir.); *Adams v. Bell*, appeal pending, No. 83-1590 (D.C. Cir.). At each extreme, the applicable principles are more or less apparent. In circumstances where an agency can obviate litigation (and a potential finding of liability) by committing itself to a course of action that is substantively in accord with the agency's intentions and of relatively brief duration, the agency should be permitted to enter into, and the court to enforce, an appropriate consent decree.¹⁴ At the other extreme, a consent decree can extend so far in time, and constitute such an extensive restriction on the discretion of an executive branch official and his successors, that it would overstep the official's authority to enter. Similarly, an order or decree that cuts so deeply into the discretion of the executive branch may be beyond the authority of the courts to enforce. See *Rizzo v. Goode*, 423 U.S. 362, 378-379 (1976); *Laird v. Tatum*, 408 U.S. 1, 15 (1972); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Even an order or decree that is appropriate when entered can become inappropriate if (through elections or otherwise) the policy of the agency changes and the decree becomes an interference with the ability of agency officials to exercise their discretionary authority. Under traditional principles of equity,

¹⁴ Thus, if petitioners are contending that an agency lacks the power to enter, and the court the power to enforce, any decree that constrains the agency's statutory or constitutional discretion, no matter how briefly or modestly, we cannot agree.

and in deference to the congressional judgment that certain decisions should be entrusted to agency discretion, there accordingly may come a time when an order or decree should be vacated or substantially modified, and the authority to execute the law in the first instance restored to the executive branch. See *Spangler v. Pasadena City Board of Education*, 611 F.2d 1239 (9th Cir. 1979), on remand from 427 U.S. 424 (1976); *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114, 1120 (3d Cir. 1979); cf. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 622-623 (1974).¹⁸

Despite the importance of this issue, however, we believe this is an inappropriate case for addressing it, for the following reasons.

1. Most prominent among the factors counselling against certiorari in this case is that the Administrator, the scope of whose discretion is at stake, in fact *supports* the consent decree here.¹⁹ Even assuming

¹⁸ Thus, if the court of appeals has concluded that government consent decrees are identical to private consent decrees with respect to the standards of *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975); *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968); and *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), we cannot agree. If a private party agrees, on behalf of himself, his heirs, successors, and assigns, to a decree that constricts his options beyond the requirements of the law, he has merely struck a bad bargain. If a government official does the same, he is purporting to bargain away the right of the people to a government run by their elected officials.

¹⁹ In the district court, the Administrator opposed petitioners' motion to vacate or revise the decree, but made a cross-motion to modify the decree. The Administrator's cross-motion was substantially similar to petitioners' motion to revise the decree. See pages 7-8, *supra*. However, the Administrator

the standing of petitioners to raise the issue,¹⁷ the separation of powers question they bring to this Court is presented in an awkward and atypical context, since the executive official whose powers have purportedly been infringed has been aligned in the litigation against his putative champions. It is also significant that, unlike in the typical consent decree controversy, Congress has implicitly sanctioned the substantive terms of this decree. See Pet. App. 56a-71a.

The agency itself is in the best position to assess whether its discretion has been seriously curtailed, as a practical and not merely an abstract matter, and whether the consent decree entered into by a previous Administrator now frustrates legitimate changes of

decided not to appeal the denial of the cross-motion, and opposed petitioners' position in the court of appeals. The current intention of the Administrator is to fulfill the few remaining requirements of the decree. See pages 14-15, *infra*.

¹⁷ Standing to sue under the Clean Water Act is, of course, exceptionally broad. Here, petitioners suffer no injury from continued implementation of the consent decree that would be sufficient to satisfy ordinary principles of standing. Even if the decree were vacated, the Administrator would remain free to carry out its terms. Thus, any benefit to petitioners from a judicial remedy in this litigation is purely speculative. See *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976). Moreover, since the decree governs only the pre-proposal stages of formulating regulations, there is no current injury to petitioners, and may never be. Petitioners will have a full opportunity to comment on any proposals that may ensue, and, if necessary, to challenge any final rules in court. The instant dispute therefore does not appear ripe for review. See generally *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967).

policy and approach. Here, the Administrator has indicated his willingness to abide by the terms of the decree. That casts considerable doubt on petitioners' proposition that the decree is an impermissible usurpation of his discretion.

Indeed, the separation of powers problems inherent in the consent decree context will remain inchoate until such time as the decree *in fact* prevents an Administrator from choosing and effectuating his policies. So long as succeeding Administrators remain content with the terms of a decree, it is difficult to see why separation of powers concerns should enable private parties to disturb the arrangement. In any event, we can see no reason for this Court to address the thorny problems raised by petitioners in this abstract context.¹⁸

2. Moreover, the controversy over this consent decree has become largely academic. In February 1982, EPA completed all tasks under paragraph 12 of the decree, which required the Agency to identify all geographic

¹⁸ It should also be noted that this consent decree is not typical of the methods usually chosen by the Agency to compromise litigation. Normally, a consent decree simply recites the Agency's intention to propose taking whatever action is agreed upon by the litigants. The lawsuit is stayed pending final action on the proposed revisions contained in the settlement agreement. If, after notice and comment, the Agency adopts a final course that is at odds with the original proposal, the other parties to the consent decree retain the right to reinstitute the litigation or to file a new lawsuit. In this manner, there is full opportunity for public participation, and the Agency retains discretion over the content of the ultimate rule. Moreover, future Administrators retain the ability to change the Agency's course or priorities through administrative action, without being required to obtain leave of court.

areas and toxic pollutants for which additional controls might be necessary after the technology-based requirements are established under paragraph 7 of the decree, and to publish its strategy for implementing such controls. And on March 13, 1984, EPA completed the tasks set forth in paragraph 4(c) of the decree, which required the Agency to identify additional pollutants, beyond the "priority" toxic pollutants listed in Appendix A to the decree, which might warrant pretreatment regulations under the Act.

Paragraph 8 of the consent decree has been substantially implemented. It sets forth the criteria by which EPA may exclude pollutants or industries from the technology-based regulations developed under paragraph 7. To date, EPA has promulgated paragraph 7 regulations for 20 of the 37 industrial categories listed in paragraph 7. It has already excluded from such regulation 10 entire categories and more than 100 subcategories of other categories based on the paragraph 8 criteria. Regulations for the remaining paragraph 7 industrial categories are scheduled to be promulgated by no later than February 1985.

Moreover, upon completing the paragraph 7 technology-based regulations for all remaining industrial categories, EPA will have discharged *all* of its obligations under the decree and will then be entitled to vacation of the decree and dismissal of the underlying lawsuits. Thus, there is a significant possibility that the issues petitioners tender for review will have become moot by the time this Court could render a decision on the merits if the petition were granted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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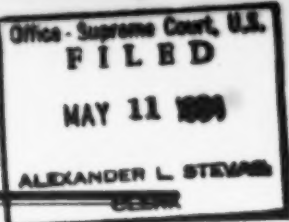
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MAY 1984

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No. 83-1345



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

UNION CARBIDE CORPORATION,
FMC CORPORATION,
MONSANTO COMPANY,
EXXON CORPORATION,
AMERICAN MINING CONGRESS,
AMERICAN IRON & STEEL INSTITUTE,
AND AMERICAN PETROLEUM INSTITUTE,
Petitioners,
v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
ENVIRONMENTAL DEFENSE FUND, INC.,
CITIZENS FOR A BETTER ENVIRONMENT,
AND BUSINESSMEN FOR THE PUBLIC INTEREST, INC.,
Respondents.

On Petition For A Writ of Certiorari To The United States
Court of Appeals For The District Of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether, contrary to this Court's decisions in *System Federation No. 91* and *Vermont Yankee*, the consent decree entered, modified, and continued in this case contravenes constitutional separation-of-powers principles by requiring an official of the Executive Branch, the Administrator of EPA, to undertake regulatory programs and to apply regulatory criteria not mandated by the Clean Water Act.

2. Whether Congress intended that the Clean Water Act of 1977 supersede the consent decree.

3. Whether the district court has jurisdiction to preserve and enforce the consent decree if the underlying causes of action are moot.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1345

UNION CARBIDE CORPORATION,
FMC CORPORATION,
MONSANTO COMPANY,
EXXON CORPORATION,
AMERICAN MINING CONGRESS,
AMERICAN IRON & STEEL INSTITUTE,
AND AMERICAN PETROLEUM INSTITUTE,
Petitioners,
v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
ENVIRONMENTAL DEFENSE FUND, INC.,
CITIZENS FOR A BETTER ENVIRONMENT,
AND BUSINESSMEN FOR THE PUBLIC INTEREST, INC.,
Respondents.

On Petition For A Writ of Certiorari To The United States
Court of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

INTRODUCTION

The main question presented in this case is important and worthy of this Court's attention, as the federal respondent ("EPA") acknowledges. EPA's Response, at 11. Whether a consent decree involving a federal agency can require that agency to exercise its statutorily-conferred discretion in a particular way is an unresolved and recurring question of considerable practical and legal significance to administrative law in this country. This

case poses that question in a procedurally proper setting where a sharply divided court of appeals explored the merits of the issue after lengthy and detailed consideration. EPA nonetheless suggests that the Court should deny certiorari, and Natural Resources Defense Council, *et al.* ("NRDC") have strongly opposed granting the writ. The reasons given by them, however, actually illustrate the desirability of review by this Court.

A. The Constrained-Discretion Question Is An Important And Recurring Issue Of Law Which Arises In An Area Where This Court's Role Historically Has Been Especially Important

1. NRDC's response perhaps makes the best argument for review by this Court. NRDC acknowledges that the consent decree in this case imposes significant constraints on EPA's discretion and argues that imposition of such constraints was fully within the district court's power.¹ NRDC, however, nowhere explains the jurisdictional basis for the district court's entry of a decree curtailing EPA's

¹ NRDC summarizes its views as follows:

In essence, NRDC claimed that EPA applied the wrong statutory criteria and did not exercise its discretion properly. EPA claimed the opposite. A classic settlement followed where the parties agreed on the appropriate criteria and an appropriate way to guide EPA's exercise of discretion within the authority provided by the Act.

If a court had no power to enter such a settlement, it would surely chill the judicial policy favoring settlement in any case where the alleged violations include an abuse of discretion.

NRDC's Response, at 12 (footnote omitted).

EPA circumspectly avoids any characterization of the nature of the constraints on its discretion due to the decree. Instead, it argues that a discretion-constraining decree is "appropriate" where the required course of action "is substantively in accord with the agency's intentions and of relatively brief duration." EPA's Response, at 11. EPA thus argues substantively that *de minimis* or small constraints are permissible, and by doing so perhaps might seem to imply that the constraints in the decree in this case fall into that category. They do not, for the reasons noted by both the majority and the dissent in the court of appeals. See 718 F.2d 1122-24 (majority) and 1132-33 (dissent), 1st. App. 13a-17a, 33a-36a.

discretion, or the rationale for avoiding constitutional separation-of-powers limits on the exercise of the jurisdiction possessed by the district court.² Moreover, although NRDC does not ask this Court to limit a fundamental separation-of-powers tenet first explicated by this Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that is the effect of its argument. In *Marbury*, Chief Justice Marshall's opinion for this Court said:

² Such jurisdiction is not supplied by 28 U.S.C. § 1361 (added by the Mandamus and Venue Act of 1962). Each of the four complaints cited that statute as a basis for the district court's jurisdiction (Ct. Appls. Appendix in Nos. 76-1664, etc., at 15-16, and Ct. Appls. Appendix in Nos. 79-1473, etc., at 67-68, 79, and 96), but mandamus lies only to correct a non-discretionary governmental duty or action. *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). The citizens-suit provision in 33 U.S.C. § 1365(a) (2), also cited by NRDC in the complaints, similarly pertains only to an alleged "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."

The federal-question jurisdictional statute, 28 U.S.C. § 1331, when taken together with the Administrative Procedure Act, authorizes review of agency action among other things to determine whether there has been an abuse of discretion. However, when such an abuse is found, the remedy is to remand for the agency to correct its error, not to interpose a specific judicially-dictated action. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Even a less-sweeping argument by NRDC—that the contested EPA actions were arguably or colorably compelled by the statute—would not have sufficed to support the district court's decree. As this Court said in *ICC v. New York, New Haven & Hartford R.R.*, 287 U.S. 178, 204 (1932) (Cardozo, J.):

Where a duty is not plainly prescribed, but is to be gathered by doubtful inference from statutes of uncertain meaning, "it is regarded as involving the character of judgment or discretion," (*Wilbur v. United States ex rel. Kadrie, supra*), and mandamus is thereby excluded.

Compare NRDC's Response, at 11-13.

In short, NRDC's theory of this case is fundamentally at odds with longstanding constitutional and statutory principles of federal jurisdictional and administrative law.

Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

(5 U.S. at 170-171.)

Ever since *Marbury v. Madison*, this Court has undertaken a special role in arbitrating constitutional separation-of-powers issues. This case stems from the same root as the Court's prior decisions on the subject and deserves this Court's attention.³

2. The separation-of-powers issue is, as EPA's response says, "of undoubted importance." EPA's Response at 11. The issue has arisen in a number of other cases, and is of obvious relevance to the ongoing practical functioning of federal administrative law, particularly in light of the burgeoning number of lawsuits being brought under various statutory citizens-suit provisions to force agency action alleged to be unlawfully withheld. Considerable pressure exists in such cases to turn the focus of settlement discussions away from statutorily-mandated actions, and instead to emphasize actions that fall within the agency's discretion, as this case illustrates.⁴

³ In a mistake so evident as to be startling, NRDC's response refers to the supremacy clause rather than separation-of-powers principles as the basis for the constitutional claim in this case. NRDC's Response, at 10.

⁴ This tendency is understandable, given the broader power typically available to an agency under its discretionary authority.

The relative importance of the issue is also shown by the number of votes of active judges in the D.C. Circuit to hear this case *en banc*. (Pet. App. 206a.) Also, in one of the other pending cases cited in EPA's response as raising a similar question, *Alliance To End*

3. The precedent established by the D.C. Circuit's decision will have a considerably greater impact on federal administrative law than a decision by another court of appeals. Depending upon the statutory scheme for judicial review, either the U.S. District Court for the District of Columbia or the U.S. Court of Appeals for the District of Columbia Circuit often is a nationally available forum for a plaintiff or a petitioner who desires to contest agency action. Indeed, under some statutes, the D.C. federal courts provide the only permissible venue.⁵ Moreover, because of the D.C. Circuit's diverse administrative-review caseload, the precedent established by the panel majority of that court in this case will affect many different agencies and circumstances. It is quite relevant that a decision which will be so broadly applied is wrong.⁶

B. No Procedural Impediment Exists Which Would Hinder This Court's Consideration Of The Questions Presented

1. Each of the questions presented is properly before the Court. Each was put at issue before the district

Repression v. Chicago, Nos. 83-1853, etc. (7th Cir.), the U.S. Court of Appeals for the Seventh Circuit has granted rehearing *en banc* and will rehear argument on June 13, 1984. The main question presented in that case, however, involves the interpretation of a consent decree rather than its validity.

Finally, as noted in the petition at 20-21 n.18, the decision of the court of appeals in this case conflicts with the decision of the Ninth Circuit in *Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983) (supremacy clause grounds for constitutional limitation on district court's power).

⁵ *E.g.*, Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1).

⁶ The dissent by Judge Wilkey more faithfully reflects this Court's prior rulings in *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), and related cases. Notably, although NRDC supports the panel majority's rationale, EPA's response adopts a position tending more toward Judge Wilkey's dissent than to the majority. See EPA's Response, at 11-12 & n.15, in part quoted *supra*, at n.1.

court and thereafter in the court of appeals, and decided on the merits by both of those courts.⁷

2. Similarly, there is no danger that the case will become moot during this Court's consideration. Both NRDC and EPA claim that discretion-constraining aspects of the decree have either been or are about to be completed, but they do not address all of EPA's continuing work under the pertinent parts of the decree. EPA's work to implement paragraph 12 of the decree, one of the discretion-constraining provisions, has in fact been completed, now that NRDC has withdrawn its earlier objections.⁸

⁷ EPA does raise two red herrings. EPA's response halfheartedly suggests that petitioners may not have standing to raise these questions and that the dispute may not be ripe for review because petitioners can challenge any final rules EPA may issue. EPA's Response, at 12-13 n.17. These two claims were never presented either to the district court or to the court of appeals, and they have no basis. An argument by EPA somewhat akin to that now put under the ripeness label was raised in the appellate litigation over the entitlement of some of the petitioners to intervene as of right under Fed. R. Civ. P. 24(a)(2). The court of appeals in 1977 rejected that claim, among others, and ruled that petitioners were entitled to intervene as of right. *NRDC v. Costle*, 561 F.2d 904 (D.C. Cir. 1977). Neither EPA nor anyone else contested the matter further.

⁸ One of the peculiarities of the decree in this case is that EPA often is able to assure itself that it has completed a task only when NRDC concedes as much. For example, EPA initially published its "Paragraph 12 Strategy" on February 3, 1982 (Ct. Appls. Appendix, at 772) and should then have been able to treat paragraph 12 as fulfilled. However, on March 15, 1982, NRDC wrote the Agency to assert "that EPA stands in direct violation of the Consent Decree," on the ground that EPA's published strategy was inadequate. (Ct. Appls. Appendix, at 705.) NRDC threatened action to seek a contempt citation from the district court:

In sum, EPA has failed in every material respect to comply with Paragraph 12. We request a meeting with you to discuss these violations and to consider any solutions you might care to offer. If we do not hear from you within two weeks, we will seek a contempt citation against you.

(Ct. Appls. Appendix, at 711.)

The dispute between EPA and NRDC was not resolved until NRDC filed its response to the petition in this case. Only then, and

However, as both EPA and NRDC acknowledge, EPA has work remaining under paragraphs 7 and 8 of the decree. Paragraph 7 requires EPA to establish effluent limitations regulations for specified industries under a court-imposed deadline, and paragraph 8 specifies criteria not mandated by the statute for EPA's decisions as to the coverage of such regulations.⁹ In addition, despite NRDC's and EPA's claims that the Agency has completed its work under paragraph 4(c), another discretion-constraining provision, the Agency in a very recent report has estimated that another 26 to 32 months actually will be required to complete its work under that provision.¹⁰ In short, EPA still has over two years'

under the pressure of this litigation, did NRDC concede "that the Agency now has completed all its commitments under Paragraph 12." (NRDC's Response, at 7.)

⁹ EPA is having particular difficulty in issuing effluent limitation regulations for the organic chemicals and plastics and synthetics industries. The deadline currently in paragraph 7 for issuing final regulations is February 1985. However, EPA has announced that the data available are not adequate. It has sought extensive additional data, by way of over 3,000 separate questionnaires to industrial facilities and also through a further plant-effluent sampling program. EPA currently plans to issue a *Federal Register* notice in August 1984, reopening the period for comment on the new data. See 49 *Fed. Reg.* 16,379 (April 19, 1984). An affidavit by Mr. Steven Schatzow of EPA, accompanying a motion to the district court dated December 22, 1983, advised that February 1985 was "the earliest date, based on best-case assumptions, by which EPA can [could] complete the formidable tasks before it and responsibly promulgate this regulation." (Schatzow Affidavit, ¶ 12.) EPA warned that if the new information being gathered turned out to be not "generally consistent with [its] expectations," then it would have to revise portions of its analyses and would require significant additional time to do so. (*Id.*, ¶ 13.) Petitioners have been advised that EPA currently is running more than several months behind this "best-case" schedule.

¹⁰ Paragraph 4(c) requires EPA to identify and to regulate by pretreatment standards pollutants other than those on lists specified in the decree. EPA on March 20, 1984 gave notice that it was making available a "Paragraph 4(c) Program Summary Report"

work to satisfy the portions of the decree at issue in this case, and, as noted, several of the remaining tasks are quite significant to petitioners and other members of the public. In seeking to dissuade the Court from granting review, NRDC, and to a lesser extent EPA as well, have omitted to state facts that show that this case is definitely not moot, nor likely to become so in the coming several years.

3. EPA's response advises that "the [current] Administrator has indicated his willingness to abide by the terms of the decree" (*id.*, at 14), and EPA's opposition to granting certiorari seems to hinge on that circumstance. EPA's response suggests that the circumstance lessens the separation-of-powers concerns and that there thus is no need for this Court to hear the case. But, as Judge Wilkey pointed out in his dissent in the court of appeals, "[f]or reasons that ultimately have to do with preserving the democratic nature of our Republic, American

describing its work thus far under that portion of the decree. 49 *Fed. Reg.* 10,357 (March 20, 1984). In its report, EPA disclosed that it had listed six compounds and would begin regulatory action:

Paragraph 4(c) requires EPA to undertake regulatory action for the compounds on the list. Because Paragraph 4(c) deals with pretreatment standards, EPA will initiate an engineering study to support development of pretreatment standards for the six compounds.

Summary Report, at 26.

EPA estimated that over two years would be required to complete its work:

At this time it is estimated that it will take at least eleven months to complete the plant selection, sampling, and analyses phase of the program. Decisions on regulatory strategy and completion of the engineering report are expected to take an additional three months. Proposal and promulgation of rules could take an additional twelve to eighteen months. We anticipate that the engineering study will start during the second quarter of 1984.

Summary Report, at 28.

A copy of the Summary Report has been lodged with the Clerk for this Court's reference.

courts have never allowed an agency chief to bind his successor in the exercise of his discretion." (718 F.2d 1134, Pet. App. 38a-39a (footnote omitted).) Especially given the remarkable lack of consistency in the attitudes of the current and prior Administrators towards the decree, the seemingly reluctant embrace of the decree by the current Administrator should not affect this Court's consideration.¹¹ If the discretion-constraining portions of the decree are not constitutionally valid, they are invalid for this Administrator as well as for all of his predecessors and successors. Neither this Administrator nor any other can waive a constitutionally-based limitation on federal judicial power. See Petition, at 22-25.¹²

¹¹ During the nearly eight years of the decree's existence, the Administrators of EPA have taken a variety of inconsistent positions regarding the decree. Indeed, individual Administrators have not themselves always been consistent in their approach. These zig-zags are reflected in the record, and especially in the fact that an Administrator sought essentially the same modification of the decree to remove the discretion-constraining provisions as that which petitioners sought; procedurally, the denial both of EPA's motion and of petitioners' motion is before the Court in this case. See EPA's Response, at 7-8, 12-13 n.16.

¹² A bar to consideration of the separation-of-powers issue might arise if Congress had expressly sanctioned the constraints in the decree on EPA's discretion. In a different context, NRDC does assert without elaboration that "Congress has specifically approved and endorsed the provisions of the Decree." NRDC's Response, at 13. EPA suggests that Congress may have implicitly sanctioned some of the substantive terms of the decree. EPA's Response, at 13. The issue came before the court of appeals in 1980 in connection with petitioners' claim that in adopting the 1977 Amendments to the Clean Water Act, Congress intended the Amendments to supersede the decree. (636 F.2d 1238, Pet. App. 56a.) The court then decided the negative proposition, i.e., that Congress had no such intent (636 F.2d 1244, Pet. App. 70a), a decision put before this Court by the second question in the petition. The court of appeals expressly did not conclude affirmatively that Congress had adopted the decree. This is also shown by the fact that the court at that time remanded the litigation to the district court for consideration of the constrained-discretion issue (636 F.2d 1258-59, Pet. App. 98a-100a).

CONCLUSION

The petition for certiorari should be granted.

In very recent reports, EPA has stated that approximately 26 to 32 months will be required to complete action on the discretion-constraining portions of the decree. The Agency nonetheless suggests that the case is moot or nearly so. If this Court does not opt to consider this case fully on the merits, it should vacate the decision of the court of appeals and remand to that court for further proceedings to determine whether the decree should be terminated or modified in light of EPA's suggestion of mootness.

Respectfully submitted,

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